Supreme Court, U. S.
FILED
JAN 31 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-6885

FLYNN NOYE HICKS, *Petitioner,*

v.

THE STATE OF OKLAHOMA, *Respondent.*

On Writ Of Certiorari To The Court Of Criminal Appeals Of The State Of Oklahoma

BRIEF OF PETITIONER

DAVID M. EBEL
2600 Colorado National Building
950 Seventeenth Street
Denver, Colorado 80202
Telephone: (303) 892-9400

Court-appointed Counsel for Petitioner

Of Counsel

RICHARD A. SONNTAG
2600 Colorado National Building
950 Seventeenth Street
Denver, Colorado 80202

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

INDEX

PAGE

OPINION BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED ... 2

QUESTIONS PRESENTED 4

STATEMENT OF THE CASE 6

SUMMARY OF ARGUMENT 12

ARGUMENT 17

I. Petitioner Was Denied Procedural Due Process When the Oklahoma Court of Criminal Appeals Sentenced Him to 40 Years Imprisonment Under the Oklahoma Habitual Criminal Statute 21 O.S. Supp. 1977, § 51(A) 17

A. The Court of Criminal Appeals Violated Due Process When It Failed to Follow Oklahoma Law Which Entitled Petitioner to be Sentenced by a Jury 17

B. The Court of Criminal Appeals Violated Due Process When It Imposed a New 40-Year Discretionary Sentence Against Petitioner Without Giving Him Notice, a Hearing, or an Opportunity to Present Mitigating Evidence 26

PAGE

C. The Court of Criminal Appeals Violated Due Process When It Sentenced Petitioner to 40 Years Imprisonment Under a Statute that Allowed Wide Sentencing Discretion But Provided No Meaningful Standards to Guide That Discretion 39

D. The Court of Criminal Appeals Violated Due Process When It Failed to Offer Any Rationale or Basis For the Sentence That It Imposed Against Petitioner 54

E. The Court of Criminal Appeals Violated Due Process When It Affirmed and Resentenced Petitioner Under a Different Statute Than the One Relied Upon At Trial 61

II. It Was Cruel and Unusual Punishment in Violation of the Eighth Amendment to Sentence Petitioner to 40 Years Imprisonment Under 21 O.S. Supp. 1977, § 51(A) 69

A. Punishment Under 21 O.S. Supp. 1977, § 51(A) Is Cruel and Unusual Because It Makes No Measurable Contribution to Acceptable Goals of Punishment, But Rather Constitutes Only the Needless Imposition of Pain and Suffering 69

B. Petitioner's Sentence Is Cruel and Unusual Because It Was Inflicted in an Arbitrary and Capricious Manner 78

PAGE

III. Petitioner Was Denied Equal Protection of the Law When He Was Classified Under An Admittedly Unconstitutional Statute and Then, Based Upon That Classification, He Was Discriminated Against By Being Denied State and Federally Guaranteed Rights 81

CONCLUSION 91

TABLE OF AUTHORITIES

PAGE

CASES:

Ex Parte Bailey, 64 P.2d 278 (Okl.Cr. 1936) 78

Barger v. Burford, 225 P.2d 196 (Okl.Cr. 1950) 77

Bell v. Burson, 402 U.S. 535 (1971) 24, 25, 33, 60

Board of Regents v. Roth, 408 U.S. 564 (1972) 24, 27

Boddie v. Connecticut, 401 U.S. 371 (1971) 25, 29

Bolling v. Manson, 345 F. Supp. 48 (D. Conn. 1972) 16, 89

Boykin v. Alabama, 395 U.S. 238 (1969) 54

Breshers v. State, 572 P.2d 651 (Okl.Cr. 1977) 66

Brinkerhaff-Faris Trust & Sav. Co. v. Hill, 281 U.S. 673 (1930) 32, 33

Brown v. State, 24 P.2d 1013 (Okl.Cr. 1933) 18, 26, 64, 83

Buchalter v. New York, 319 U.S. 427 (1943) 22

Burney v. State, 594 P.2d 1226 (Okl.Cr. 1979) 83

Chandler v. Fretag, 348 U.S. 3 (1954) 28, 38

Chewning v. Cunningham, 368 U.S. 443 (1962) 28, 38

Coker v. Georgia, 433 U.S. 584 (1977) 15, 40, 69, 70, 73, 77

Cole v. Arkansas, 333 U.S. 196 (1948) 15, 66

Coleman v. United States, 357 F.2d 563 (D.C. Cir. 1965) 26, 30 51, 57

Craig v. Boren, 429 U.S. 190 (1976) 87

De Jonge v. Oregon, 299 U.S. 353 (1937) 67

Page

Dorszynski v. United States, 418 U.S. 424 (1974) 51, 59

Douglas v. California, 372 U.S. 353 (1963) 85

Duncan v. Louisiana, 391 U.S. 145, reh. den. 392 U.S. 947 (1968) 19, 22, 25, 54

Dunn v. United States, _____ U.S. _____, 99 S.Ct. 2190, 47 L.W. 4607 (June 4, 1979) 15, 68

Eaton v. Tulsa, 415 U.S. 697 (1974) 65

Ellison v. State, 493 P.2d 837 (Okl.Cr. 1972) 78

Epperson v. State, 181 P.2d 292 (Okl.Cr. 1947) 17

Exum v. State, F-77-677 (Okl.Cr. 1979) 42

Fischer v. State, 593 P.2d 507 (Okl.Cr. 1979) 83

Frontiero v. Richardson, 411 U.S. 677 (1973) 87

Fulton v. State, 491 P.2d 789 (Okl.Cr. 1971) 17

Furman v. Georgia, 408 U.S. 238 (1972) reh. den. 409 U.S. 902 ..... *passim*

Gagnon v. Scarpelli, 411 U.S. 778 (1973) ..... *passim*

Gardner v. Florida, 430 U.S. 349 (1977) ..... *passim*

Garland v. Oklahoma, No. F-77-728 (Okl.Cr. 1978) 42

Garner v. Louisiana, 368 U.S. 157 (1961) 54

Geduldig v. Aiello, 417 U.S. 484 (1974) 87

Gerchman v. Maroney, 355 F.2d 302 (1966) 37

Page

Giaccio v. Pennsylvania, 382 U.S. 399 (1966).....*passim*

Glona v. American Guarantee & Liability Ins. Co., 391 U.S. 73 (1968) reh. den. 393 U.S. 898 87

Goldberg v. Kelly, 397 U.S. 254 (1970).....*passim*

Gore v. United States, 357 U.S. 386 (1958) 50

Goss v. Lopez, 419 U.S. 565 (1975).....24, 25, 31

Graham v. Richardson, 403 U.S. 365 (1971)..... 87

Graham v. West Virginia, 224 U.S. 616 (1912)..... 77

Greenholtz v. Inmates of Nebraska Penal and Correctional Complex, _____ U.S. _____, 99 S.Ct. 2100 (1979).....38, 60-61

Gregg v. Georgia, 428 U.S. 153, reh. den. 429 U.S. 875 (1976).....*passim*

Griffin v. Illinois, 351 U.S. 12 (1956).....85, 86

Hill v. United States, 368 U.S. 424, reh. den. 369 U.S. 808 (1962) 22

Hopt v. Utah, 110 U.S. 574, 28 L.Ed. 262 (1884).....12, 20

Hurtado v. California, 110 U.S. 516 (1884) 43

Ingraham v. Wright, 430 U.S. 651 (1977) 27

Jackson v. Denno, 378 U.S. 368 (1964) 54

Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123 (1951).....31, 61

Karns v. State, 224 P. 373 (Okl.Cr. 1924).....18, 26, 64, 83

Page

Ex Parte Kemmler, 136 U.S. 436 (1890) 19

Kent v. United States, 383 U.S. 541 (1966).....36, 38

Klimas v. Mabry, 599 F.2d 842 (8th Cir. 1979)....13, 21, 22, 25

Lambert v. State, F-77-715 (Okl.Cr. 1978) 42

Ex Parte Lange, 18 Wall 163, 85 U.S. 872 (1874)..18, 26, 64, 83

Lee v. State, 572 P.2d 260 (Okl.Cr. 1977) 42

Loving v. Virginia, 388 U.S. 1 (1967).....16, 87

Ex Parte Lyde, 191 P. 606 (Okl.Cr. 1920) 18

Marbury v. Madison, 1 Cranch 137 (1803) 43

Mathews v. Eldridge, 424 U.S. 319 (1976).....14, 52, 58

McDonald v. Massachusetts, 180 U.S. 311 (1901) 77

McGautha v. California, 402 U.S. 183 (1971) reh. den. 406 U.S. 978.....43, 44, 54

Mempa v. Rhay, 389 U.S. 128 (1967).....13, 28, 37, 49, 68

Moore v. Missouri, 159 U.S. 673 (1895).....72, 77

Morissette v. United States, 342 U.S. 246 (1952) 71

Morrissey v. Brewer, 408 U.S. 471 (1972).....*passim*

Mullane v. Central Hanover Bank and Trust Co., 339 U.S. 306 (1950).....13, 32

Murray v. Hoboken, 18 How. 272, 59 U.S. 372 (1856) 19

Myers v. State, F-77-372 (Okl.Cr.).....42

North Carolina v. Pearce, 395 U.S. 711 (1969).....14, 19 25, 56, 60

Page

In re Oliver, 333 U.S. 257 (1948) 69

O'Neil v. Vermont, 144 U.S. 323 (1892) 70, 73, 76

Oyler v. Boles, 368 U.S. 448 (1962) 28, 49

Palko v. Connecticut, 302 U.S. 319 (1937) 43

Parham v. J.R., _____ U.S. _____, 99 S.Ct. 2493 (1979) 33

Paul v. Davis, 424 U.S. 693 reh. den. 425 U.S. 985 (1976) 12, 23

Pennsylvania ex rel Sullivan v. Ashe, 302 U.S. 51 (1937) ..29, 72

People v. Olivas, 17 Cal.3d 235, 551 P.2d 375 (1976).....16, 89

Perry v. Sindermann, 408 U.S. 593 (1972) 32

Powell v. Texas, 392 U.S. 514, reh. den. 393 U.S. 898 (1968) 74

Presnell v. Georgia, 439 U.S. 14, 58 L.Ed.2d 207 (1978)..15, 67

Reed v. Reed, 404 U.S. 71 (1971) 87

Reynolds v. Sims, 377 U.S. 533 (1964) reh. den. 379 U.S. 870 89

Roberts v. Louisiana, 428 U.S. 325, reh. den. 429 U.S. 890 (1976).....44, 45

Robinson v. California, 370 U.S. 660 (1962)..15, 69, 70, 71, 78

Rogers v. Britton, 476 F. Supp. 1036 (E.D. Ark. 1979)...13, 48

Royster Guano Co. v. Virginia, 253 U.S. 412 (1920) 84

Rummel v. Estelle, 587 F.2d 651 (1968) *cert. granted*, 60 L.Ed. 1064 (May 21, 1979) 69

Page

Sam v. State of Oklahoma, No. F-77-621 (Okl.Cr. 1979) .. 42

San Antonio School Dist. v. Rodriguez, 411 U.S. 1 (1973), reh. den. 411 U.S. 959 87

Saunders v. Shaw, 244 U.S. 317, 37 S.Ct. 638 (1917).....33, 64

Scott v. United States, 419 F.2d 264 (D.C. Cir. 1969) 57

Shanahan v. State, 354 P.2d 780 (Okl.Cr. 1960).....12, 17 22, 24, 25

Shapiro v. Thompson, 394 U.S. 618 (1969).....60, 85, 89, 90

Skinner v. Oklahoma, 316 U.S. 535 (1942) 89

Specht v. Patterson, 386 U.S. 605 (1967).....13, 14 25, 28, 37, 55, 68

Spencer v. Texas, 385 U.S. 554, reh. den. 386 U.S. 969 (1967) 71

Sugarman v. Dougall, 413 U.S. 634 (1973) 16

Sutton v. State, F-77-617 (Okl.Cr. 1978) 42

Swann v. Charlotte Mecklenburg Bd. of Ed., 402 U.S. 1 (1971), reh. den. 403 U.S. 912 86

Thigpen v. State, 571 P.2d 467 (Okl.Cr. 1977) 10, 11 16, 76, 81, 83, 84, 85, 90

Thompson v. Louisville, 362 U.S. 199 (1960) 46

Townsend v. Burke, 334 U.S. 736 (1948).....28, 49, 57

Trop v. Dulles, 356 U.S. 86 (1958).....63, 70, 71, 78, 80

United States v. Ammidown, 497 F.2d 615 (D.C. Cir. 1973) 56

Page

United States ex rel Collins v. Claudy, 204 F.2d 624 (3d Cir. 1953) 36

United States v. Kras, 409 U.S. 434 (1973) 87

United States v. Lewis, 392 F.2d 440 (4th Cir. 1968) 57

United States v. Tucker, 404 U.S. 443 (1972).....25, 57

United States ex rel Robinson v. York, 281 F. Supp. 8 (D. Conn. 1968) 89

Van Curen v. State, F-78-127 (Okl.Cr. 1979) 42

Walker v. Sauvinet, 2 Otto 93, 92 U.S. 90 (1876).....12, 19

Weems v. United States, 217 U.S. 349 (1910).....15, 70 73, 74, 76, 80

Williams v. New York, 337 U.S. 241 (1948) 30

Wolff v. McDonnell, 418 U.S. 539 (1974).....*passim*

Woodson v. North Carolina, 428 U.S. 280 (1976)....29, 44, 46

Yick Wo v. Hopkins, 118 U.S. 356 (1886)..... 52

CONSTITUTIONS, STATUTES:

U.S. Const. Amend. VIII.....*passim*

U.S. Const. Amend. XIV.....*passim*

18 U.S.C. 3575 (1976) 72

28 U.S.C. § 1257(3) 2

21 O.S. Supp. 1977, § 51(A)..... *passim*

Page

21 O.S. Supp. 1977, § 51(B)..... *passim*

21 O.S. §§ 715, 1116, 801 40

21 O.S. Supp. 1979, § 1541.2.....40, 75

22 O.S. § 926.....4, 10, 12, 17, 24

22 O.S. Supp. 1979, § 982 18

57 O.S. Supp., § 519..... 18

57 O.S. Supp. 1979 § 138 70

57 O.S. § 332.7 70

63 O.S. Supp. 1976, § 2-401.....2, 6, 23, 28, 62, 77, 91

Arizona, R.S.A. § 13-604, 13-702 to 703 (1979) 75

California, P.C. § 667.5 (West Supp. 1978) 72

Connecticut, G.S.A. § 53a-35, 53a-40 (1972 and Supp. 1978) 72

Kansas, C.C. § 21-4504 (Vernon Supp. 1978) 75

Kentucky, R.S.A. § 532.080 (Supp. 1978)..... 72

Louisiana, C.C.P.A. Art. 15:529.1 (1956 and Supp. 1978) 75

Maryland, A.C. Art. 27, § 643B (Supp. 1978) 72

Massachusetts, M.G.L.A. Ch. 279 § 25 (West 1972) 72

Mississippi, M.C.A. § 99-19-81-83 (Supp. 1978) 72

Montana, R.C.A. § 46-18-501, 502 (1978) 72

Nebraska, R.S. § 29-2221 (1975)..... 72

New Hampshire, R.S.A. § 651.6 (1974)..... 72

Page

Oklahoma Pardon and Parole Board Policy No. 005 70

Rhode Island, G.L. § 12-19-21 (1969) 72

South Dakota, C.L.A. § 22-6-1, 22-7-7-9 (Supp. 1978) 75

Utah, C.A. § 76-8-1001 (1977) 72

Wisconsin, S.A. § 939.62 (West 1975 and Supp. 1978) 75

OTHER AUTHORITIES:

ABA Project on Minimum Standards For Criminal Justice, *Standards Relating to Sentencing Alternatives and Procedures,* par. 5.6 61

ABA Project on Standards for Criminal Justice, *Appellate Review of Sentences,* pp. 2—3 61

Berkowitz, *The Constitutional Requirement for a Written Statement of Reasons and Facts in Support of the Sentencing Decision: A Due Process Proposal,* 61 Iowa L. Rev. 205, 235 (1974) 61

Brown, *The Treatment of General Recidivist Statutes,* 48 Colum.L.Rev. 238 (1948) 73

Hennessey, *Disparity in Sentencing,* New England J. Prison L. 5, 9—11 61

Kaufman, *The Sentencing Process and Judicial Inscrutability,* 49 St. Johns L. Rev. 215, 221—222 (1975) 61

Page

Recidivist Impacts of Differential Sentencing Practices for Burglary Offenders, Criminology, pp. 387-396 (Nov. 1977) 73

Rubin, *Law of Criminal Correction* (2d ed. 1973) 73

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-6885

FLYNN NOYE HICKS, *Petitioner,*

v.

THE STATE OF OKLAHOMA, *Respondent.*

On Writ Of Certiorari To The Court Of Criminal Appeals Of The State Of Oklahoma

BRIEF OF PETITIONER

OPINION BELOW

The opinion of the Court of Criminal Appeals of the State of Oklahoma, *Hicks v. Oklahoma,* No. F-77-751, is an unpublished opinion of the Oklahoma Court of Criminal Appeals. It is set forth in the Appendix beginning at A. 57. The "Order Denying Petition for Rehearing" from that court dated April 6, 1979, is reproduced in the Appendix at A. 61. There was no opinion prepared by the District Court of Oklahoma County, Oklahoma, in which court the petitioner was initially tried and convicted.

JURISDICTION

The opinion and judgment of the Court of Criminal Appeals of the State of Oklahoma was entered on March

8, 1979 (A. 57). The "Order Denying Petition for Rehearing" was entered on April 6, 1979 (A. 61). The Petition for Writ of Certiorari was filed on June 21, 1979, and it was granted on November 26, 1979. The jurisdiction of this Court rests upon 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eighth Amendment to the United States Constitution provides as follows:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Fourteenth Amendment to the United States Constitution provides as follows:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

63 O.S. § 2-401 provides as follows:

> A. Except as authorized by this act, it shall be unlawful for any person:
>
> 1. To manufacture, distribute, dispense, or possess with intent to manufacture, distribute, or dispense, a controlled dangerous substance;
>
> . . . .
>
> B. Any person who violates this section with respect to:
>
> 1. A substance classified in Schedules I or II which is a narcotic drug or lysergic acid diethylamide (LSD) is guilty of a felony and shall be sentenced to a term of imprisonment for not less than five (5) years nor more than twenty (20) years and a fine of not more than Twenty Thousand Dollars ($20,000). . . .

21 O. S. Supp. 1977, § 51(A) read as follows at the time petitioner was convicted:

> Every person who, having been convicted of any offense punishable by imprisonment in the penitentiary, commits any crime after such conviction is punishable therefor as follows:
>
> 1. If the offense of which such person is subsequently convicted is such that upon a first conviction an offender would be punishable by imprisonment in the penitentiary for any term exceeding five (5) years, such person is punishable by imprisonment in the penitentiary for a term not less than ten (10) years.
>
> 2. If such subsequent offense is such that upon a first conviction the offender would be punishable by imprisonment in the penitentiary for a term not exceeding ten (10) years.
>
> 3. If such subsequent conviction is for petit larceny, or for any attempt to commit an offense which, if committed, would be punishable by imprisonment in the penitentiary, then the person convicted of such subsequent offense is punishable by imprisonment in the penitentiary for a term not exceeding five (5) years.

21 O.S. Supp. 1977, § 51(B) read as follows at the time that the petitioner was convicted:

> Every person who, having been twice convicted of felony offenses, commits a third, or thereafter, felony

offenses within ten (10) years of the date following the completion of the execution of the sentence, shall be punished by imprisonment in the State Penitentiary for a term of twenty (20) years plus the longest imprisonment for which the said third or subsequent conviction was punishable, had it been a first offense; provided, that felony offenses relied upon shall not have arisen out of the same transaction or occurrence or series of events closely related in time or location; provided, further, that nothing in this section shall abrogarte or affect the punishment by death in all crimes now or hereafter made punishable by death.

22 O.S. § 926 reads as follows:

> In all cases of a verdict of conviction for any offense against any of the laws of the State of Oklahoma, the jury may, and shall upon the request of the defendant assess and declare the punishment in their verdict within the limitations fixed by law, and the court shall render a judgment according to such verdict, except as hereinafter provided.

QUESTIONS PRESENTED

1. Whether petitioner was denied due process of law when the State of Oklahoma first sentenced him to 40 years imprisonment under an admittedly unconstitutional mandatory habitual criminal statute, and then upon appeal resentenced him to an identical 40-year term under a different habitual criminal statute that allowed standardless discretion to impose any sentence between 10 years and life imprisonment without according him notice or hearing on such resentencing or an opportunity to present any mitigating evidence, without giving any explanation for the sentence imposed, and without remanding the case for jury sentencing as required by Oklahoma law.

2. Whether it was cruel and unusual punishment to sentence petitioner to 40 years imprisonment for an isolated $50 sale of heroin under an habitual criminal statute that makes no measurable contribution toward any acceptable goal of punishment because it permitted enhanced punishment even though the petitioner had not served any actual time under his previous felony convictions and because the punishment was not made proportional to the offense. Whether it was cruel and unusual punishment for the Court of Criminal Appeals to impose a 40-year sentence upon the petitioner under a discretionary but standardless habitual criminal statute for an isolated $50 sale of heroin without giving petitioner any notice, hearing or opportunity to present mitigating evidence under the statute or offering petitioner any explanation as to why he was being sentenced so much more severely than others similarly situated.

3. Whether petitioner was denied equal protection of the law when the Court of Criminal Appeals classified petitioner under an admittedly unconstitutional statute and then, based upon that classification, discriminated against him by denying him his state-guaranteed right to jury sentencing and his federally guaranteed right to notice, a hearing and a right to present mitigating evidence before sentencing.

STATEMENT OF THE CASE

Flynn Noye Hicks (hereafter "petitioner") and a codefendant Dianne Elizabeth Jones (hereafter "Jones") were charged by Information in the District Court, Oklahoma County, State of Oklahoma, with the Unlawful Distribution of a Controlled Dangerous Substance Heroin in violation of 63 O.S. Supp. 1976, § 2-401 (A. 4-5).

Petitioner and Jones were tried by jury on April 12 and 13, 1977. Petitioner was represented by the Public Defender's Office of Oklahoma County, Oklahoma, at the trial and initially upon appeal. The State introduced evidence at the trial from an undercover agent to the effect that on October 5, 1976, in what was essentially a single transaction, he acquired one balloon of heroin from petitioner and one balloon of heroin from Jones and paid to Jones a total of $50 for such balloons (R.T. 40-42). On April 13 the jury returned a verdict of quilty as to both petitioner and Jones.

On April 14, 1977, the jury was reconvened to consider the sentencing stage of the trial. Jones was charged under the regular penalty provision of 63 O.S. Supp. 1976, § 2-401, which provided for a punishment of "imprisonment for not less than five (5) years nor more than twenty (20) years and a fine of not more than Twenty Thousand Dollars ($20,000)." Petitioner, on the other hand, was charged by means of page 2 of his Information (A.6, Supp. R.) with having committed the aforementioned Unlawful Distribution of a Controlled Dangerous Substance Heroin

> after he had been convicted of the following crime punishable by imprisonment in the State Penitentiary: BURGLARY IN THE SECOND DEGREE on the 4th day of June, 1970 in the District Court of Oklahoma County, State of Oklahoma . . .; ASSAULT AND BATTERY WITH A DANGEROUS WEAPON WITH INTENT TO DO BODILY INJURY on the 21st day of October, 1975 in the District Court of Oklahoma County, State of Oklahoma . . .

This Information in effect caused petitioner to be charged under Oklahoma's mandatory sentencing statute for habitual offenders, 21 O.S. Supp. 1977, § 51(B).

The second page of the Information was then read to the jury and petitioner entered "his pleas of not guilty" to that charge (A. 14). Petitioner stipulated that the State's Exhibits Nos. 5 and 6 ("Judgment and Sentence Suspended on Plea of Guilty"[1] to the two prior felony offenses charged in the Information) (R. Exhs. 5 and 6) were authentic records; that the defendants there were represented by counsel; and that they represent final convictions. The petitioner did not stipulate, however, that he was the same individual as the defendants in those prior convictions (A. 15).

Thereafter the State introduced evidence that the petitioner was the same individual as the defendants in those

---

[1] Because these were both suspended sentences, petitioner has not spent any previous time in prison as a result of these two prior convictions. (See the docket entries pertaining to the two previous convictions, which are public records and copies of which have been lodged with the Clerk of this Court.)

prior convictions, and it rested its case against petitioner under 21 O.S. Supp. 1977, § 51(B) (A. 16-19).

The court then read the sentencing instructions to the jury (A. 7-10), which charged, among other things,

> This second portion of the Information is simply the charge upon which the defendant is placed upon trial on this issue and sets forth in a formal way the offense of which the defendant is accused. . . .
>
> You are instructed that as to the defendant Flynn Noye Hicks the law provides that every person who, having been twice convicted of felony offenses, commits a third, or thereafter, felony offenses within ten (10) years of the date following the completion of the execution of the sentence, *shall be punished* by imprisonment in the State Penitentiary for a term of twenty (20) years plus the longest imprisonment for which the said third or subsequent conviction was punishable, had it been a first offense.
>
> Under the facts of this case this means that *should you find that this defendant has been twice convicted of felony offenses* and that he committed the present offense within ten years of the completion of both of the previous offenses, *then you shall assess his punishment at forty (40) years imprisonment in the State Penitentiary.*
>
> Should you find that this defendant had previously been convicted of only one felony offense at the time he committed the present offense, then you shall assess his punishment at imprisonment in the State Penitentiary for a term not less than ten (10) years.
>
> Should you find that this defendant has not been previously convicted of any felony offenses, then you shall assess his punishment at imprisonment for not less than five (5) years nor more than twenty (20) years and a fine of not more than Twenty Thousand Dollars ($20,000.00). (Emphasis added.)

On its closing argument on this second stage of the trial, the State time and time again emphasized the mandatory nature of the sentence to be imposed against Hicks:

> It's *mandatory* the Legislature said, as Your Honor read to you in the Instructions. And the Judge sets the law out, I don't and the other attorneys don't.
>
> It is *mandatory* that they get forty years if you find that he has been convicted of two felonies before. (A. 20) (emphasis added).
>
> . . . .
>
> The law says that two previous convictions, then it *shall be* forty years.
>
> And I—*the State doesn't feel that there is really any alternative on it;* because the only evidence that you've heard is two previous convictions, and that's unrefuted. (A. 25) (emphasis added).

The jury, based upon these instructions and closing argument, returned a verdict under the mandatory 21 O.S. Supp. 1977, § 51(B) finding petitioner "guilty of Unlawful Distribution of a Controlled Dangerous Substance, after having been previously convicted of two felony offenses and assess his punishment at imprisonment in the State Penitentiary for a term of forty (40) years." (A. 40).

As to Jones, the jury returned a sentence of five years, which was the lowest sentence they could return against her, even though the State had asked for fifteen years (A. 21, 41).

Of course, because petitioner was charged, tried and convicted under the mandatory habitual criminal statute § 51(B), no presentence report was prepared on him; he had no occasion at the trial to present mitigating circumstances or evidence; and he had no opportunity to plead to either the jury or the court for sentencing leniency in imposing a sentence less than 40 years.[2]

Subsequent to petitioner's trial but before his appeal was heard, the Oklahoma Court of Criminal Appeals ruled that 21 O.S. Supp. 1977, § 51(B) was unconstitutional in an unrelated case. *Thigpen v. State,* 571 P.2d 467 (Okl.Cr. 1977). On appeal to the Oklahoma Court of Criminal Appeals, petitioner claimed, inter alia, that he was sentenced under an unconstitutional statute and that he was denied a fair trial in violation of his rights under the United States Constitution (A. 50-52; R. Hicks' Brief in the Court of Criminal Appeals, p. 12).

The Oklahoma Court of Criminal Appeals, in an opinion filed on March 8, 1979, agreed that petitioner was sentenced under an unconstitutional statute. However, instead of remanding the matter to the District Court for a new jury trial on sentencing as required by 22 O.S. § 926, the Court of Criminal Appeals chose to support petitioner's sentence under the discretionary provisions of 21

[2] Petitioner's attorney did argue that the State had not proven that petitioner was the same person as the defendants in the earlier convictions, and therefore that he should not receive the mandatory 40-year sentence (A. 28-29). However, the jury specifically found that petitioner did have two prior convictions, so it had no choice but to return a 40-year sentence (A. 40).

O.S. Supp. 1977, § 51(A).[3] The court's entire discussion on this matter is as follows:

> Defendant asserts in his fourth assignment of error that 21 O.S. Supp. 1977, § 51(B), under which he was sentenced, is unconstitutional. We agree. This question was laid to rest by this Court in *Thigpen* v. *State,* Okl.Cr., 571 P.2d 467 (1977). We must find however, that the defendant was not prejudiced by the use of this statute in that the sentence imposed is within the range of punishment authorized by the provisions of 21 O.S. Supp. 1977, § 51(A). (A. 58)

Petitioner had no notice that the Court of Criminal Appeals would sentence him under § 51(A) rather than remanding the matter, and there was no hearing held on that sentence. Although § 51(A) is a discretionary statute and requires the sentencing authority to exercise discretion in choosing an appropriate sentence between 10 years and life, the Court of Criminal Appeals exercised this discretion in secret, without the benefit of any presentence report, and without ever having laid eyes on petitioner or giving petitioner any opportunity to be heard or to present any mitigating circumstances.[4] Nor was petitioner's

[3] The reference to § 51(A) is more technically to § 51(A)(1). There are two other subsections under §51(A) but neither of them is relevant to the facts of this case. Because the Oklahoma Court in its opinions simply refers to § 51(A) petitioner will follow that practice in this Brief upon the understanding that this actually refers only to § 51(A)(1).

[4] Because petitioner had no occasion to argue mitigating circumstances at the District Court since he was under a mandatory sentence there, this means that, throughout the entire sentencing process, he has never been afforded any hearing or opportunity to argue that he should be given a less severe sentence.

counsel actually present at any time before the Court of Criminal Appeals because no oral argument was allowed on the appeal. To compound matters, the Court of Criminal Appeals did not offer any explanation to petitioner or make any findings as to why it felt a 40-year sentence under § 51(A) was appropriate for him.

On March 23, 1979, petitioner filed a Petition for Rehearing *Pro Se* (R. Petition for Rehearing), which was denied on April 6, 1979 (A. 61). On June 21, 1979, petitioner filed Writ of Certiorari in the United States Supreme Court, which this Court granted on November 26, 1979.

SUMMARY OF ARGUMENT

I. Petitioner Was Denied Procedural Due Process When the Oklahoma Court of Criminal Appeals Sentenced Him To 40 Years Imprisonment Under the Oklahoma Habitual Criminal Statute 21 O.S. Supp. 1977, § 51(A).

A. *Oklahoma's Failure To Follow Its Own Sentencing Procedures Violated Due Process.* Oklahoma law guarantees criminal defendants the right to be sentenced by a jury. 22 O.S. § 926; *Shanahan v. State,* 354 P.2d 780 (Okl.Cr. 1960). This state-created entitlement to jury sentencing is part of the "law of the land" in Oklahoma and its observance by the Oklahoma courts is thus mandated under the Fourteenth Amendment. *Hopt v. Utah,* 110 U.S. 574; *Paul v. Davis,* 424 U.S. 693, 710-711; *Walker v. Sauvinet,* 2 Otto 93, 92 U.S. 90. When the Oklahoma Court of Criminal Appeals disregarded this law

by sentencing petitioner itself under a new section of the Habitual Criminal Statute after declaring unconstitutional a different section of the same law under which petitioner had been sentenced below, petitioner suffered grievous injury in that he was denied his state-guaranteed right to be sentenced by jury. *Klimas v. Mabry,* 599 F.2d 842. This violated due process of law.

B. *Petitioner Was Denied Due Process of Law When He Was Resentenced by the Court of Criminal Appeals Without Notice, Hearing, or an Opportunity to Present Mitigating Circumstances.* Minimal standards of due process require some kind of prior notice and hearing any time a person's liberty is threatened. *Gardner v. Florida,* 430 U.S. 349; *Mempa v. Rhay,* 389 U.S. 128; *cf. Goldberg v. Kelly,* 397 U.S. 254; *Mullane v. Central Hanover Bank and Trust Co.,* 339 U.S. 306. Minimal due process, therefore, requires that a convicted person facing discretionary sentencing be allowed notice and a hearing at which to present evidence in mitigation of sentence. *Specht v. Patterson,* 386 U.S. 605; *Morrissey v. Brewer,* 408 U.S. 471. Petitioner was denied this minimal due process protection when he was resentenced without notice, hearing, or the opportunity to present mitigating evidence.

C. *Petitioner Was Denied Due Process Because He Was Sentenced Under a Statute Permitting Wide Discretion Without Any Standards to Direct That Discretion.* Due Process requires that discretionary sentencing be conducted in accordance with meaningful sentencing standards. *Gregg v. Georgia,* 428 U.S. 153; *Giaccio v. Pennsylvania,* 382 U.S. 399; *Rogers v. Britton,* 476 F. Supp.

1036 (E.D. Ark. 1979). The absence of such standards in 21 O.S. Supp. 1977, § 51(A), under which petitioner was resentenced, created a real danger of arbitrary or even vindictive sentencing on the part of the Oklahoma Court of Criminal Appeals. In allowing standardless sentencing under a statute permitting a range from 10 years to life imprisonment, the Oklahoma Legislature has abrogated its responsibility to set sentencing standards—thereby leaving petitioner's liberty subject to a government of men, not of laws.

D. *Petitioner Was Denied Due Process When the Appellate Court Failed to Give Any Reasons Explaining Why It Imposed a 40-Year Sentence on Petitioner.* Due process requires that a sentencing court set forth a simple and brief statement of reasons for each sentence imposed. *Morrissey v. Brewer,* 408 U.S. 471; *Specht v. Patterson,* 386 U.S. 605; *North Carolina v. Pearce,* 395 U.S. 711. This type of statement is necessary for effective appellate review; it is necessary to minimize the risk that the sentencing court will issue its sentence upon an erroneous or inadequate basis; and it would contribute to the legitimacy of sentencing decisions and the rehabilitation of the defendant. *Mathews v. Eldridge,* 424 U.S. 319; *Morrissey v. Brewer,* 408 U.S. 471; *Specht v. Patterson,* 386 U.S. 605.

E. *Petitioner's Due Process Rights Were Violated When His Sentence Was Affirmed and Reissued on the Basis of a Different Statute Than the One Relied Upon Below.* Petitioner was originally sentenced under § 51(B). On appeal the Oklahoma Court of Criminal Appeals held § 51(B) unconstitutional but nevertheless affirmed petitioner's sentence by imposing the same sentence against him under § 51(A), notwithstanding the fact that petitioner was not sentenced below under § 51(A). *Presnell v. Georgia,* 439 U.S. 14; *Cole v. Arkansas,* 333 U.S. 196; *Dunn v. United States,* 47 U.S.L.W. 4607 (June 4, 1979).

II. It Was Cruel and Unusual Punishment In Violation Of The Eighth Amendment To Sentence Petitioner To 40 Years Imprisonment Under The Oklahoma Habitual Criminal Statute 21 O.S. Supp. 1977 § 51(A).

Petitioner's 40-year sentence is cruel and unusual because it makes no measurable contribution to the acceptable penological goals of rehabilitation, deterrence, isolation and retribution, and thus is nothing more than the "needless imposition of pain and suffering." *Coker v. Georgia,* 433 U.S. 584, 592; *Gregg v. Georgia,* 428 U.S. 153. Specifically, § 51(A) is unconstitutional because it does not require that previous time have been served on the prior felony convictions and because it makes no effort to relate the severity of the punishment to the seriousness of the offense. *Weems v. United States,* 217 U.S. 349; *Robinson v. California,* 370 U.S. 660. Further, petitioner's sentence was cruel and unusual because of the manner in which it was imposed, without notice, hearing, an opportunity to present mitigating circumstances, or any explanation. *Furman v. Georgia,* 408 U.S. 238.

III. Petitioner Was Denied Equal Protection of the Law When He Was Classified Under An Admittedly Unconstitutional Statute, and Then, Based Upon that Classification, He Was Discriminated Against By Being Denied State and Federally Guaranteed Rights.

Petitioner was classified unconstitutionally when he was initially tried and convicted under § 51(B) of the Oklahoma Habitual Criminal Statute. *Thigpen v. State,* 571 P.2d 467 (Okl.Cr. 1977). The Oklahoma Court of Criminal Appeals recognized that § 51(B) bore no rational relationship to any legitimate state purpose and it struck down that statute as violative of the Fourteenth Amendment. Yet, thereafter the Oklahoma Court of Criminal Appeals continued to use that unconstitutional classification to deny petitioner his state-guaranteed right to jury sentencing and his federal rights to notice and a hearing when it resentenced petitioner under § 51(A) without remanding the case to the District Court for a new jury trial on sentencing as was accorded all other defendants charged initially under § 51(A). This violated petitioner's equal protection rights. It is also argued that petitioner was discriminated against on the basis of a state-created "suspect classification," *Loving v. Virginia,* 388 U.S. 1; *Sugarman v. Dougall,* 413 U.S. 634, and that his "fundamental" rights were violated when the Court of Criminal Appeals sentenced him to 40 years imprisonment. *People v. Olivas,* 17 Cal.3d 236, 551 P.2d 375 (1976); *Bolling v. Manson,* 345 F. Supp. 48 (D. Conn. 1972).

ARGUMENT

I. Petitioner Was Denied Procedural Due Process When The Oklahoma Court Of Criminal Appeals Sentenced Him To 40 Years Imprisonment Under The Oklahoma Habitual Criminal Statute 21 O.S. Supp. 1977, § 51(A).

A. The Court of Criminal Appeals Violated Due Process When It Failed to Follow Oklahoma Law Which Entitled Petitioner to be Sentenced by a Jury.

The State of Oklahoma, unlike many other States in the Union, has an express statute and policy entitling defendants to be sentenced by juries rather than judges. 22 O.S. § 926 reads as follows:

> In all cases of a verdict of conviction for any offense against any of the laws of the State of Oklahoma, the jury may, and shall upon the request of the defendant assess and declare the punishment in their verdict within the limitations fixed by law, and the court shall render a judgment according to such verdict, except as hereinafter provided.

The Oklahoma Court of Criminal Appeals in *Shanahan v. State,* 354 P.2d 780, 784, 786 (1960), has held that the right to be sentenced by a jury is a "sacred right conferred by [Oklahoma] laws," and that jury sentencing may not be dispensed with except upon "voluntary consent or waiver of the accused ..." See *Epperson v. State,* 181 P.2d 292 (Okl.Cr. 1947) (overruled on other grounds, *Fulton v. State,* 491 P.2d 789 (1971)), where the court held that the defendant had to be resentenced by the jury when the in-

itial sentence was found to have been under the wrong section of the habitual sentencing statute.[5]

It should be emphasized at the outset that the Court of Criminal Appeals here did not merely modify an otherwise constitutional sentence. Rather, it declared petitioner's initial sentence and § 51(B) under which it was imposed to be unconstitutional (A. 58). As such, petitioner's initial sentence was void and of no effect. *Brown v. State,* 24 P.2d 1013 (Okla.Cr. 1933); *Karns v. State,* 224 P. 373 (Okla.Cr. 1924); *Ex Parte Lange,* 18 Wall 163, 85 U.S. 872, 879. Thus, when the Court of Criminal Appeals imposed its 40-year sentence on petitioner under § 51(A), it started with a clean slate and relied on an entirely different statute which provided a new basis for sentencing: *i.e.,* a discretionary sentence rather than a mandatory sentence. It became the sentencing entity, and the essential ingredient of sentencing discretion was exercised by it rather than by the jury.[6]

From the time of Magna Carta, the principle that no person should be deprived of life, liberty, or property except by due process of law has been understood to require regular administration, through courts of law, of the "law

[5] The summary manner in which the Court of Criminal Appeals chose to resentence petitioner under a new statute violated Oklahoma procedures in other regards as well. See, *e.g., Ex Parte Lyde,* 191 P. 606 (Okl.Cr. 1920) (holding under Oklahoma law that a defendant has a right to be present in open court when a sentence is imposed against him). See also 22 O.S. Supp. 1979 § 982 as amended by 57 O.S. Supp. § 519 (requiring a presentence report before sentencing).

[6] The jury has been expressly prohibited from exercising any discretion when it initially sentenced petitioner under § 51(B) (A. 9).

of the land," in accordance with those rules and forms which have been established for the protection of private rights.[7] *Murray v. Hoboken,* 18 How. 272, 59 U.S. 372, 374-376; *Ex Parte Kemmler,* 136 U.S. 436.

This Court, long ago, established that "Due process of law is process due according to the law of the land. This process in the States is regulated by the law of the State." *Walker v. Sauvinet,* 2 Otto 93, 92 U.S. 90. Doctrinal evolution in the succeeding 100 years has not affected this fundamental principle. See, *e.g., North Carolina v. Pearce,* 395 U.S. 711, 739 (Black, J., concurring),

> Due process, moreover, is a guarantee that a man should be tried and convicted only in accordance with valid laws of the land. If a conviction is not valid under these laws, statutory and constitutional, a man has been denied due process . . . .

[7] See *Duncan v. Louisiana,* 391 U.S. 145, 169 (Black, J., concurring) ("The origin of the Due Process Clause is Chapter 39 of Magna Carta which declares that 'No free man shall be taken, outlawed, banished, or in any way destroyed, nor will we proceed against or prosecute him, except by the lawful judgment of his peers and by the *law of the land.*' . . . [B]y the end of the 14th century 'due process of law' and 'law of the land' were interchangeable. Thus the origin of this clause was an attempt . . . to do away with . . . judicial commissions *with no sure and definite procedural protections* and under laws that might have been improvised to try their particular cases. Chapter 39 of Magna Carta was a guarantee that the government would take neither life, liberty, nor property without a trial *in accord with the law of the land* that already existed at the time the alleged offense was committed. This means that the Due Process Clause gives all Americans . . . the right to be tried by independent and unprejudiced courts *using established procedures and applying valid pre-existing laws.*") (emphasis added.)

One of the clearest declarations by this Court that due process is violated when a state fails to follow its own established criminal procedures is found in the case of *Hopt v. Utah,* 110 U.S. 574, 28 L.Ed. 262. The State of Utah had established a statutory right of defendants to be present during the challenge of jurors for cause. Notwithstanding this statutory right, several jurors were challenged out of the presence of the defendant, and he claimed that that procedure denied him due process of law. This Court, in a unanimous decision, agreed. In language that has often been quoted, the Court said,

> Neither [Life nor liberty] can be lawfully taken *except in the mode prescribed by law. That which the law makes essential in proceedings* involving the deprivation of life or liberty *cannot be dispensed with* or affected by the consent of the accused; much less by his mere failure, when on trial and in custody, to object to unauthorized methods. . . .*[T]he Legislature has deemed it essential* to the protection of one whose life or liberty is involved in a prosecution for felony, that he shall be personally present at the trial, that is, at every stage of the trial when his substantial rights may be affected by the proceedings against him. If he be deprived of his life or liberty without being so present, such deprivation would be without that due process of law required by the Constitution. 28 L.Ed. at 265 (emphasis added).

A case presenting facts that are strikingly similar to petitioner's situation here is *Klimas v. Mabry,* 599 F.2d 842 (8th Cir. 1979). Klimas was convicted by an Arkansas jury of burglary and grand larceny, and in a bifurcated

trial in which Klimas was charged under Arkansas' Habitual Criminal Statute, the jury imposed two consecutive sentences totaling 63 years imprisonment upon a record that showed seven previous felonies in the State of Missouri and six petty burglary offenses in the State of Arkansas. Arkansas, like Oklahoma, gave defendants a statutory right to have this sentence imposed by a jury. Upon appeal, the Arkansas Supreme Court reversed the jury sentence because it was unable to determine whether Klimas had been represented by counsel in the Missouri convictions. However, it found the Arkansas convictions not suspect, and concluded that it could impose a new sentence upon Klimas of 42 years under the habitual criminal statute based upon the Missouri convictions, without the necessity of remanding the case for a new jury sentence. Upon a habeas corpus proceeding, the Eight Circuit Court of Appeals concluded in a unanimous opinion that Klimas' due process rights were violated when he was denied his statutory right to be resentenced by a jury. The court concluded,

> Where a state has provided, by statute, that a habitual criminal charge is to be tried to a jury, we do not believe that the state can abrogate that right in a particular case without violating the notions of fundamental fairness inherent in the due process clause. Where a right to trial by jury has been established under state law, the state cannot deny a particular accused that right without violating even the minimal standards of the due process clause. *Id.* at 848.

This is not to say that every trivial deviation from state criminal procedure will constitute a violation of due

process. See *Buchalter v. New York,* 319 U.S. 427. However, if the disregarded procedure has substantive content and if it could have altered or modified the resulting conviction or sentence, then there can be no doubt that the failure of the state to follow such procedure violates due process. *Hill v. United States,* 368 U.S. 424, 429; *Id.* at 430-435 (Black, J., dissenting); *Klimas v. Mabry, supra.*

It is clear beyond peradventure that in the State of Oklahoma the right to be sentenced by a jury is far more than a *de minimis* procedural ritual. The Oklahoma Court of Criminal Appeals in *Shanahan v. State,* 354 P.2d 780, 784 (Okl.Cr. 1960), has described the right this way,

> Under our system of jurisprudence this is a *sacred right* conferred by our laws and constitutes a right of which a defendant may not be deprived in absence of waiver.

cf., Duncan v. Louisiana, 391 U.S. 145. Nor can it be denied that the sentencing outcome might have been different in this case had petitioner been accorded his right to be sentenced by a jury. Under § 51(A), the petitioner could have received a sentence of as little as 10 years. Instead, the Court of Criminal Appeals imposed a 40-year sentence upon him. How severe would the sentence have been had it been imposed by the jury? Although the State of Oklahoma has prevented us from answering this question when it failed to follow its own procedures, we do know that the jury sentenced petitioner's codefendant to the *absolute minimum sentence permissible* for commission of the very same substantive offense charged against petitioner.[8] Thus, even if it were proper to resentence petitioner under § 51(A) (a point which is challenged later on in this brief), it may have cost petitioner 30 years of freedom because the State of Oklahoma failed to follow its own procedures.

Another way of analyzing petitioner's claim that leads to the same result is to recognize that under Oklahoma law petitioner has received an "entitlement" or right that his liberty not be taken from him except upon a sentence imposed by jury. Depriving petitioner of this liberty entitlement is a violation of due process.

There can no longer be any doubt that state law may confer rights and privileges which, once granted, may not be denied or withheld without violation due process. *Paul v. Davis,* 424 U.S. 693, 710-711,

> It is apparent from our decisions that there exists a variety of interests which are difficult of definition but are nevertheless comprehended within the meaning of either "liberty" or "property" as meant in the Due Process Clause. These interests attain this constitutional status by virtue of the fact that they have been *initially recognized and protected by state law,* and we have repeatedly ruled that the procedural guarantees of the Fourteenth Amendment apply whenever the State seeks to remove or significantly alter that protected status. (Emphasis added.)

---

[8] Because petitioner's codefendant was not charged as an habitual criminal, the range of her permissible punishment was from 5 to 20 years. 63 O.S. § 2-401. The jury returned a 5-year sentenance (A. 41).

Goss v. Lopez, 419 U.S. 565, 573 ("Here, *on the basis of state law,* appellees plainly had legitimate claims of entitlement to a public education." (emphasis added)); *Bell v. Burson,* 402 U.S. 535, 541 ("Since the *statutory scheme* makes liability an important factor in the State's determination to deprive an individual of his licenses, the State may not, consistently with due process, eliminate consideration of that factor in its prior hearing." (emphasis added)); *Morrissey v. Brewer,* 408 U.S. 471 (parole rights); *Goldberg v. Kelly,* 397 U.S. 254 (Welfare rights); *Wolff v. McDonnell,* 418 U.S. 539 (good time credit rights).

Few, if any, of the rights listed in the preceding paragraph had their initial origins in the Constitution. Rather, "they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Board of Regents v. Roth,* 408 U.S. 564, 577. The same may be said of petitioner's right to be sentenced by jury. Although there may be no right under the United States Constitution to be sentenced by a jury, there clearly is such a right for petitioner emanating from Oklahoma law. 22 O.S. § 926; *Shanahan v. State,* 354 P.2d 780, 784 (Okl.Cr. 1960). And, there can be no doubt that state created entitlements relating to sentencing procedures or to the term of incarceration are clearly protected as "liberty" interests under the due process clause of the United States Constitution. *Morrissey v. Brewer,* 408 U.S. 471; *Wolff v. McDonnell,* 418 U.S. 539; *Gagnon v. Scarpelli,* 411 U.S. 778; *Specht v. Patterson,* 386 U.S. 605; *North Carolina v. Pearce,* 395 U.S. 711; *United States v. Tucker,* 404 U.S. 443; *Gardner v. Florida,* 430 U.S. 349.

It may be conceded that not every deprivation of a liberty entitlement need rise to the level of constitutional protection. Certain entitlements may be so devoid of substance that constitutional protection is not required because the entitlement is *"de minimis"* or "trivial." *Cf. Goss v. Lopez,* 419 U.S. 565, 576, 580. A stricter test would ask whether the deprivation of the liberty entitlement results in a "grievous loss." *Morrissey v. Brewer,* 408 U.S. 471, 481; *Wolff v. McDonnell,* 418 U.S. 539, 560. Still other articulations ask whether the interest is an "important" one, *Bell v. Burson,* 402 U.S. 535, 539, or "significant," *Boddie v. Connecticut,* 401 U.S. 371, 379.

It matters not which of these tests is used, because petitioner passes them all with room to spare. As stated previously, jury sentencing in Oklahoma is regarded as a "sacred right." *Shanahan v. State,* 354 P.2d 780, 784 (Okl.Cr. 1960). Jury sentencing is substantively quite different from sentencing by a judge, and the jury process of exercising its collective discretion to find an appropriate sentence is likely to focus on and emphasize factors differently than would a judge. *Klimas v. Mabry,* 599 F.2d 842 (8th Cir. 1979); *Duncan v. Louisiana,* 391 U.S. 145. Petitioner is "entitled" to an opportunity to try to persuade a jury, as his codefendant successfully did, to return a minimum sentence against him. This "entitlement" could be worth 30 years of his liberty. To be denied this

opportunity is far more than a *"de minimis"* loss; it is a "grievous loss" of an "important" and "significant" liberty interest. As such, petitioner was denied due process of law.

B. The Court of Criminal Appeals Violated Due Process When It Imposed a New 40-Year Discretionary Sentence Against Petitioner Without Giving Him Notice, a Hearing, or an Opportunity to Present Mitigating Evidence.

Petitioner was originally sentenced under § 51(B), which required a mandatory 40-year sentence (A. 9, 40). On appeal, the Oklahoma Court of Criminal Appeals held that § 51(B) was unconstitutional (A. 58). As such, the original sentence against petitioner was void and of no effect. *Brown v. State,* 24 P.2d 1013 (Okl.Cr. 1933); *Karns v. State,* 224 P. 373 (Okl.Cr. 1924); *Ex Parte Lange,* 18 Wall 163, 85 U.S. 872, 879; *Coleman v. United States,* 357 F.2d 563 (D.C. Cir. 1965). The Court of Criminal Appeals then concluded that petitioner should be sentenced under § 51(A), which allows a discretionary sentence to be imposed from 10 years to life imprisonment (A. 58).

Rather than remanding the matter for a new sentencing proceeding before a jury, the Court of Criminal Appeals apparently decided it would be more expedient to short-cut the process by simply resentencing petitioner under § 51(A) to the same 40-year term (A.58).

The first time that petitioner learned he was to be sentenced under a discretionary statute was when he read the opinion of the Court of Criminal Appeals. This action by the Court of Criminal Appeals was taken against petitioner without any warning whatever, without hearing or

notice, and without giving petitioner any opportunity to present mitigating evidence or to argue for sentencing leniency.

It is petitioner's contention that this procedure denied him due process of law.

This analysis begins with the two-step process articulated in *Ingraham v. Wright,* 430 U.S. 651, 672,

> The Fourteenth Amendment prohibits any State deprivation of life, liberty or property without due process of law. Application of this prohibition requires the familiar two-stage analysis: we must first ask whether the asserted individual interests are encompassed within the Fourteenth Amendment's protection of "life, liberty or property"; if protected interests are implicated, we then must decide what procedures constitute "due process of law." *Morrissey v. Brewer,* 408 U.S. at 481 . . .; *Board of Regents v. Roth,* 408 U.S. 564, 569-572 . . . .

This Court has often said that a defendant's liberty interest in receiving a proper sentence qualifies as protected under the Due Process Clause of the Fourteenth Amendment. See *Gardner v. Florida,* 430 U.S. 349, 358 ("[I]t is now clear that the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause.")[9]

---

[9] Although *Gardner* was a capital punishment case, the quoted language appears to describe the developing law of sentencing in general and not restricted to capital punishment sentencing. This conclusion is buttressed by the fact that the Court cited several noncapital punishment cases in support of this conclusion.

Lest there be any doubt about this, however, reference may be made to other cases where this Court explicitly, or implicitly, has held that the defendant has a protected liberty interest at the sentencing stage of a trial sufficient to invoke constitutional safeguards. *Mempa v. Rhay,* 389 U.S. 128; *Townsend v. Burke,* 334 U.S. 736; *Chandler v. Fretag,* 348 U.S. 3.

When sentencing is performed under a habitual criminal statute, this liberty interest is even more clearly constitutionally protected. *Chewning v. Cunningham,* 368 U.S. 443, 445; *Specht v. Patterson,* 386 U.S. 605, 609-610; *Oyler v. Boles,* 368 U.S. 448, 452.

Indeed, even after the sentencing process is completed, defendants continue to have a protected liberty interest in making sure that their sentences are administered against them fairly. *Morrissey v. Brewer,* 408 U.S. 471, 480-482; *Wolff v. McDonnell,* 418 U.S. 539, 557-558; *Gagnon v. Scarpelli,* 411 U.S. 778, 781-782.

Here, of course, petitioner has been ordered incarcerated behind bars for the next 40 years of his life. Under anyone's definition of "liberty" this would qualify as a protected interest under the Due Process Clause. Petitioner has a liberty interest in being sentenced to the shortest term possible under § 51(A).[10] Or, stated differently, his liberty interest is in being allowed his full range of procedural rights, including a hearing before the proper sentencing authorities, so that he can present mitigating evidence and argue that the sentencing discretion under § 51(A) should be exercised leniently toward him.

[10] Later in this brief, petitioner challenges the constitutionality of any sentencing under § 51(A) and he argues that he should be resentenced instead under 63 O.S. § 2-401. However, that statute also allows for discretionary sentencing (within a range of 5 to 20 years) and petitioner would have the same liberty interest there to be able to utilize the full procedures to which he is entitled under the due process clause to try to persuade the sentencing authority to issue a lenient sentence.

When the Court of Criminal Appeals resentenced petitioner to 40 years under § 51(A) without notice or hearing and without allowing him any opportunity to plresent mitigating evidence, it deprived him of any chance or opportunity that he might have had to show that, under all the circumstances, a proper exercise of discretion would lead to the imposition of a minimum 10-year sentence. This chance or opportunity is potentially worth 30 years of petitioner's liberty.

Since it is clear that we are dealing with a protected liberty interest, the question that remains then is, what due process procedures are required in the context of imposition of a discretionary sentence? The precise nature of the due process protection depends, of course, upon the nature of the interest involved and the nature of the proceeding. *Boddie v. Connecticut,* 401 U.S. 371, 378. So now we turn to the nature of the proceeding.

It may be conceded at the outset that the sentencing stage of a trial is different from the stage that determines guilt or innocence. Modern penology has emphasized the need to look at the offender and not just the offense in order to determine an appropriate sentence. *Woodson v. North Carolina,* 428 U.S. 280, 304; *Pennsylvania ex rel Sullivan v. Ashe,* 302 U.S. 51, 55. This greater breadth of

inquiry at sentencing has been used to justify the withholding of certain rights that are normally guaranteed at the trial on guilt or innocence when such rights would otherwise restrict the Court's scope of inquiry. *Williams v. New York,* 337 U.S. 241 (The Court may rely on a presentence report in sentencing even though it contains hearsay evidence and even though the defendant cannot adequately confront or cross-examine on the statements contained therein.)

However, to the extent that a defendant's due process rights have been relaxed at sentencing it has been to allow a *greater* scope of inquiry; it has not been used to *restrict* the scope of inquiry. Yet if a defendant is not allowed a hearing and a chance to present his side of the story on sentencing, the court will be doing just that. The deck will be stacked against petitioner so that, through presentencing reports or otherwise, absent and disinterested third parties can say all the bad things they want about the defendant's background and personality, while the most interested party of all—the defendant himself—has no chance to make a showing, on his own behalf, of either mitigating circumstances or other aspects of his life and personality that merit sympathetic consideration in the discretionary mix. As the United States Court of Appeals for the District of Columbia said in *Coleman v. United States,* 357 F.2d 563, 571, with reference to sentencing discretion under a District of Columbia death penalty statute,

> It is a sole discretion to "consider circumstances in mitigation and in aggravation," and to make his determination upon such consideration. It is not a discretion to fail to consider circumstances in mitigation . . .

Although the extent of due process rights may wax and wane with the nature of the proceeding, there are certain "minimum" or fundamental" due process rights that must always be recognized whenever a protected liberty interest is jeopardized. These basic rights include a hearing, and for a hearing to be meaningful rather than a sham, there must also be notice and a right to present evidence and argument before the decision-making body. This due process right to a meaningful hearing has been recognized as a "minimum" or "fundamental" right so often and in so many diverse contexts (many involving protected interests much less important than the liberty interest at stake here upon sentencing) that this proposition can no longer be open to serious doubt: *Goss v. Lopez,* 419 U.S. 565, 579,

> "[M]any controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that *at a minimum* they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case." (emphasis added.)

Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 150, 162 (Frankfurter, J., concurring).

> "One of [The *fundamental*] principles is that no person shall be deprived of his liberty without opportunity, at some time, to be heard, . . ." "[I]t must give

them an opportunity to be heard respecting the justice of the judgment sought." (emphasis added.)

Mullane v. Central Hanover Bank and Trust Co., 339 U.S. 306, 314,

> "The *fundamental* requisite of due process of law is the opportunity to be heard." . . . This right to be heard has little reality or worth unless one is informed that the matter is pending . . . .
>
> . . . .
>
> An *elementary and fundamental* requirement of due process . . . is notice . . . to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. (emphasis added.)

Brinkerhoff-Faris Trust & Sav. Co. v. Hill, 281 U.S. 673, 681,

> Our present concern is solely with the question whether the plaintiff has been accorded due process in *the primary sense,*—whether it has had an opportunity to present its case and be heard in its support. (emphasis added.)

Goldberg v. Kelly, 397 U.S. 254, 267,

> "The fundamental requisite of due process of law is the opportunity to be heard." Grannis v. Ordean, 234 U.S. 385, 394. . . . In the present context [termination of welfare benefits] these principles require that a recipient have timely and adequate notice . . . and an effective opportunity to defend . . . by presenting his own arguments and evidence orally.

See also *Perry v. Sindermann*, 408 U.S. 593 (right to hearing before teaching contract may be terminated); *Bell v. Burson*, 402 U.S. 535 (right to hearing before driver's license may be suspended); *Parham v. J.R.*, _____ U.S. _____, 99 S.Ct. 2493 (right to hearing before there may be a civil commitment of a child).[11]

No citation is needed for the proposition that at the guilt stage of a trial a defendant is entitled to notice, a hearing, and an opportunity to present evidence on his own behalf.[12] Similary, after conviction and sentencing has occurred this Court has held that a defendant is entitled to notice, a hearing, and a right to present evidence any time the authorities seek to revoke his parole, probation,

---

[11] When an appellate court unexpectedly changes the rules and decides a case upon grounds that were not anticipated at the time the case was tried below, due process requires that the case be remanded to give the parties notice and a new hearing opportunity to present evidence on the new issue. *Saunders v. Shaw*, 244 U.S. 317; *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673. This is analogous to petitioner's situation because the Oklahoma Court of Criminal Appeals unexpectedly ruled that § 51(B) was unconstitutional and that petitioner should be sentenced under a new, discretionary statute. However, the Court of Criminal Appeals neither remanded the case for further proceedings below, nor did it call a hearing itself before presuming to exercise its own discretion as to what an appropriate sentence should be.

[12] For many defendants the sentencing stage is *more* important than the quilt stage of the trial. If the evidence of guilt is clear, as it often is, the defendant's best hope is to persuade the sentencing entity to give him a lenient sentence. Thus, allowing him a full hearing before sentencing to present mitigating circumstances and evidence becomes absolutely critical to his liberty interests, and it may be his only realistic opportunity to try to protect his liberty or minimize its loss through sentencing.

or accrued good time credits. *Morrissey v. Brewer,* 408 U.S. 471 at 488-489 (parole revocation),

> [The "minimum requirements of due process"] include
> (a) written notice of the claimed violations of parole;
> (b) disclosure to the parolee of evidence against him;
> (c) opportunity to be heard in person and to present witnesses and documentary evidence . . . .

Wolff v. McDonnell, 418 U.S. 539 at 563, 566 (good time credits),

> ["Minimum requirements of procedural due process" include] advance written notice . . . .
>
> We are also of the opinion that the inmate facing disciplinary proceedings should be allowed to call witnesses and present documentary evidence in his defense when permitting him to do so will not be unduly hazardous to institutional safety or correctional goals. Ordinarily, the right to present evidence is basic to a fair hearing . . . .

Gagnon v. Scarpelli, 411 U.S. 778 at 782, 786 (probation revocation),

> "[M]inimum requirements of due process" include ". . . (a) written notice of the claimed violations of [probation] . . .; (b) disclosure to the [probationer] . . . of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; . . ."

If these rights are constitutionally mandated before portions of an original sentence can be *re*instated, must not at least equal constitutional protections be accorded to the imposition of the sentence in the first instance?

If anything, the original sentencing procedure should accord a defendant more constitutional protections because he is still within the judicial context and, until sentence is actually imposed, no final judgment has been issued against him. *Morrissey v. Brewer,* 408 U.S. 471 at 480. All the judicial mechanisms for factfinding (such as subpoenas and court reporters) are in place. Furthermore, there can be no risk of injury to prison discipline or postsentencing supervision by granting a defendant a full hearing at the sentencing stage of his trial.

It is not sufficient to say that the process of sentencing involves the application of discretion and specialized expertise and therefore no formal hearing is needed. What is the name of discretion when it is exercised in a vacuum without an adequate factual record to support it? Its name is caprice. What is the name of discretion when exercised upon only half a record—the half that the state chooses to bring before the court? Its name is bias. What is the name of specialized expertise that renders judgments which are not preceded by a fair and full factual examination into the question before it? Its name is fiat.

The sentencing process, like any of the other judicial processes, is a symbiotic blend of factfinding and judgment. And the end result is only as strong as its weakest link. The process of finding a defendant guilty requires the finding of certain facts and then the exercise of judgment to weigh those facts to see if the legal standards of guilt are satisfied. Similarly, with the process of parole or proba-

tion revocation, the factfinder must determine factually whether the conditions of parole or probation have been violated, and then he must exercise predictive judgment to determine whether the situation merits revocation of the probation or parole. *Morrissey v. Brewer,* 408 U.S. 471, 479-480. Is sentencing any different? The sentencing authority makes factual findings about the circumstances of the crime, the defendant's background, and his motivation, and then applies discretion to decide an "appropriate" sentence within the parameters set by the state. See *United States ex rel Collins v. Claudy,* 204 F.2d 624, 628 (3d Cir. 1953):

> [A sentencing hearing under a recidivist statute] serves two important purposes. It is as essential to the establishment of a legal basis for any enhanced sentence as proof of premeditation is in many states for capital punishment for murder. . . . At the same time *it also enables the court to employ informed judgment in the exercise of its far reaching discretion* whether to impose additional punishment, and how much, on account of such prior conviction and attendant circumstances as the inquiry may reveal. *Essential fairness dictates that the disposition of any issue* thus determinative of the legal power of the tribunal and *thereafter influential upon its discretion to punish a defendant* must be after some notice to the accused that the issue is before the court followed by an opportunity to be heard. (emphasis added.)

Kent v. United States, 383 U.S. 541, 553-554; *Morrissey v. Brewer,* 408 U.S. 471, 484.

In *Gardner v. Florida,* 430 U.S. 349, 362, this Court

held that due process required that the defendant be notified of the contents of the presentence report and given an opportunity to deny or explain the allegations contained therein before sentencing. In *Mempa v. Rhay,* 389 U.S. 128, the Court held that the defendant was entitled to counsel at sentencing. Obviously, the right to counsel would be a hollow right if it does not also contemplate notice, hearing, and an opportunity to present mitigating circumstances to the sentencing court.

When sentencing is under an habitual criminal statute, this Court has been even more expansive in recognizing due process rights at the sentencing stage. In *Specht v. Patterson,* 386 U.S. 605, 609-610, the Court reviewed the sentencing procedures under the Colorado Sex Offenders Act, which it likened to recidivist statute sentencing. The Court quoted with approval a statement from *Gerchman v. Maroney,* 355 F.2d 302, 312, in stating what due process rights were available to the defendant upon sentencing,

> "Petitioner therefore was entitled to a full judicial hearing before the magnified sentence was imposed. At such hearing the requirements of due process cannot be satisfied by partial or niggardly procedural protections. A defendant in such a proceeding is entitled to the full panoply of the relevant protections which due process guarantees in state criminal proceedings. . . ."
>
> Due process, in other words, requires that he be presented with counsel, have an opportunity to be heard, be confronted with witnesses against him, have the right to cross-examine, and to offer evidence of his own.

See also *Chewning v. Cunningham,* 368 U.S. 443, and *Chandler v. Fretag,* 348 U.S. 3, which held that the defendant was entitled to counsel at the habitual criminal sentencing stage of the trial. As noted above, right to counsel would be meaningless if it did not subsume the right to notice, hearing, and an opportunity to present evidence and argument.

The cost to the state to assure each defendant an evidentiary hearing would not be great. In most cases it could be expected that the hearing would involve little more than an opportunity for the defendant to tell his own story. But in other cases there may be important additional evidence that the defendant would like to bring before the court which was not relevant at the hearing stage.

The benefits, on the other hand, would be great in terms of encouraging rehabilitation, *Morrissey v. Brewer,* 408 U.S. 471, 484; *Greenholtz v. Inmates,* _____ U.S. _____, 99 S.Ct.Rptr. 2100, 2117-2118 (Marshall dissenting in part); and in terms of preserving the appearance as well as the reality of fair, considered treatment of defendants. See *Kent v. United States,* 383 U.S. 541, 554,

> [B]ut there is no place in our system of law for reaching a result of such tremendous consequences without ceremony--without hearing, without effective assistance of counsel, without a statement of reasons.

See also *Morrissey v. Brewer,* 408 U.S. 471, 499 (Douglas, J., dissenting in part).

> The rule of law is important in the stability of society . . . "Notice and opportunity for hearing appropriate to the nature of the case," . . . are the rudiments of due process which restore faith that our society is run for the many, not the few, and that fair dealing rather than caprice will govern the affairs of men.

The petitioner here is asking for the right to present evidence of mitigating circumstances and to be able to argue to the sentencing authorities that he should be given leniency under § 51(A). He has not yet had this opportunity, and the discretion that has been exercised against him by the Court of Criminal Appeals has therefore been exercised on an incomplete record and without adequate factual basis. In all of this, the petitioner has been denied his due process of law.

C. The Court of Criminal Appeals Violated Due Process When It Sentenced Petitioner to 40 Years Imprisonment Under a Statute That Allowed Wide Sentencing Discretion But Provided No Meaningful Standards to Guide That Discretion.

The time has come for this Court to rule unequivocally that in a noncapital case, as well as in capital cases, sentencing legislation must contain meaningful sentencing standards for the trial court or jury to follow when it allows wide latitude in sentencing discretion.

So that the facts relevant to this argument are clearly in mind, several of them should be restated: (1) §51(A)(1), under which petitioner was resentenced by the Oklahoma Court of Criminal Appeals (A. 58). That statute authorizes the imposition of any sentence ranging from

ten years to life imprisonment.[13] Excluding capital punishment which could not constitutionally be imposed in any event for a single sale of heroin, cf. *Coker v. Georgia,* 433 U.S. 584, that leaves practically the entire range of sentencing options to the discretion of the court or jury; (2) no standards or guidance are set forth in § 51(A) to assist the judge or jury in deciding whether a particular defendant merits a light, moderate or heavy sentence under this statute; (3) two successive juries or the same judge in two successive cases could, within the "limits" set in § 51(A), impose a life term for a person convicted of two separate charges of passing bad checks in separate face amounts of $21 apiece,[14] and then sentence the next defendant to 10 years imprisonment for first degree manslaughter, second degree rape, or robbery with a dangerous weapon even though he may have had dozens of prior felony convictions;[15] (4) the Oklahoma Court of Criminal Appeals, in imposing sentence under § 51(A), was not required to state any reasons why it chose the punishment that it did, and no such reasoning was ever given.

---

[13] 21 O.S. Supp. 1977, § 51(A)(1) [hereinafter "§ 51(A)"] reads as follows:

> Every person who, having been convicted of any offense punishable by imprisonment in the penitentiary, commits any crime after such conviction is punishable therefore as follows: (1) If the offense of which such person is subsequently convicted is such that upon a first conviction an offender would be punishable by imprisonment in the penitentiary for any term exceeding five (5) years, such person is punishable by imprisonment in the penitentiary for a term not less than ten (10) years.

[14] See 21 O.S. Supp. 1979 § 1541.2.

[15] See 21 O.S. §§ 715, 1116, 801.

Lacking any statutory standards or judicial findings, the petitioner in this case is left wondering whether his 40-year sentence was arbitrary and capricious or whether it had some basis in fact or legislative policy. The statute and the court both stand mute before his inquiry. We know that the Court of Criminal Appeals could not have based its sentencing discretion on the prior jury sentence because the jury had been given no discretion whatever to pick an appropriate sentence for petitioner. It was instructed that the 40-year term was mandatory (A. 9).[16] And this sentence had been stricken, in any event, as unconstitutional (A. 58). We know that the Court of Criminal Appeals could not have based its sentencing discretion upon a subjective evaluation of the petitioner and his need for incarceration, because it had no presentence report, it gave petitioner no hearing or other opportunity to present any mitigating circumstances, and, indeed, it had never even laid eyes on the petitioner.[17] We know also that the Court of Criminal Appeals could not have based its sentencing discretion on an objective determination that conviction for sale of heroin with prior convictions for burglary in the second degree and assault and battery always merits a 40-year sentence, because when the Court of Criminal Appeals was faced with other defendants who committed essentially the same crimes who had also been unconstitu-

---

[16] Indeed, when the jury was given discretion it imposed the minimum permissible punishment of 5 years upon petitioner's codefendant for the very same offense (A. 41).

[17] Nor was a presentence report or mitigating evidence introduced below because there petitioner was convicted under a mandatory sentencing statute.

tionally sentenced under § 51(B), it appears generally to have reduced those sentences to terms far shorter than petitioner's term.[18]

Why then was this petitioner sentenced to 40 years imprisonment? Was it because he is black or young or was there something known specially to the court but not revealed to petitioner? (R.T. 38; "Conviction: Summary of Facts"). None of us know. The Legislature gave the court free rein to do with the petitioner whatever it wished.

---

[18] See *Garland v. Oklahoma,* No. F-77-728 (the defendant's third offense was the sale of heroin. Prior offenses were burglary in the second degree and *manslaughter* in the second degree. The Court of Criminal Appeals struck down a 40-year sentence under § 51(B), and imposed a discretionary 27-year sentence under § 51(A)); *Sam v. State of Oklahoma,* No. F-77-621 (the third offense was for the sale of cocaine. Previous offenses were both for burglary in the second degree. Once again, the Court of Criminal Appeals reversed a 40-year sentence under § 51(B) and imposed a 25-year discretionary sentence under § 51(A)). Indeed, in most cases known to this petitioner in which the Oklahoma Court of Criminal Appeals has been faced with a sentence imposed under the unconstitutional § 51(B), it has significantly reduced the term in resentencing the defendant under § 51(A). E.g. *Lee v. State of Oklahoma,* 572 P.2d 260. *Exum v. State,* F-77-677 (30 year sentence under § 51(B) reduced to 10 years under § 51(A)); *Van Curen v. State,* F-78-127 (27-year sentence under § 51(B) reduced to 17 years under § 51(A)); *Lambert v. State,* F-77-715 (life sentence plus 20 years under § 51(B) modified to 45 years under § 51(A)); *Myers v. State,* F-77-372 (27-year sentence under § 51(B) modified to 14 years under § 51(A)); *Sutton v. State,* F-77-617 (27-year sentence under § 51(B) modified to 20 years under § 51(A)). Copies of these unpublished opinions are on file with the Clerk of this Court. A reading of these cases can only leave one with the impression that the new sentences imposed by the Court of Criminal Appeals are "freakishly" imposed in an arbitrary and capricious manner.

The court reached its decision in private and issued its fiat without explanation. Whether one agrees with the 40-year sentence or not, no one can deny that this is the naked rule of men, exercised in secret to control essentially the entire remaining life of another human being. It is not the act of a "government of laws" nor is it "ordered liberty." *Marbury v. Madison,* 1 Cranch 137, 163; *Hurtado v. California,* 110 U.S. 516; *Palko v. Connecticut,* 302 U.S. 319; *McGautha v. California,* 402 U.S. 183, 250-252, 254 (Brennan, J., dissenting). *Id.* at p. 296, note 54.

The review of modern opinions by this Court on the need for standards to control sentencing discretion probably can begin with *McGautha v. California,* 402 U.S. 183 (1971). In an opinion by Justice Harlan, joined by four other members of the Court, it was held not to violate due process for a statute to give a jury standardless discretion to decide between imposing the death penalty or life imprisonment upon a defendant convicted of first degree murder. Justice Black concurred, and a vigorous dissent was written by Justice Brennan, joined by Justices Douglas and Marshall, in which it was argued that legislative standards must be imposed to guide the jury's discretion. 402 U.S. at 248.

Several observations should be made about *McGautha.* First, the California statute involved there was limited to a very narrow group of crimes and it authorized only two very specific penalties for the jury to choose between: life imprisonment and death. The Oklahoma statute under which Hicks was sentenced, on the other hand, covers the entire range of felonies within the state (ranging

from writing a bad check for $21 to committing murder), and it allows the jury or sentencing judge discretion among essentially the entire range of permissible penalties short of death itself. Thus, the range of discretion allowed in Oklahoma is considerably broader than the discretion confronted by the Court in *McGautha*.

Second, *McGautha* has either been overruled or strictly limited to its own facts by subsequent decisions of this Court. *Furman v. Georgia,* 408 U.S. 238, 400 (Berger, C.J., dissenting); *Id.* at p. 429, n. 11 (Powell, J., dissenting); *Gregg v. Georgia,* 428 U.S. 153, 195 n. 47.

The next significant case involving sentencing standards was *Furman v. Georgia,* 408 U.S. 238. That case struck down the Texas death penalty statute and it spawned nine separate opinions; five concurring opinions and four dissents. In those opinions, Justices White and Stewart seemed to join the position previously espoused by Justices Brennan, Douglas and Marshall in their dissent in *McGautha v. California,* that standardless jury sentencing in a capital case was unconstitutional.[19] *Furman v. Georgia, Id.* at 306-310 (Stewart, J., concurring); *Id.* at 310-314 (White, J., concurring).

By the time the Court decided *Woodson v. North Carolina,* 428 U.S. at 280, Justices Powell and Stevens had concurred in an opinion by Justice Stewart that there must be specific legislative standards for a jury to follow in determining whether to impose a life or death sentence. *Id.*

[19] In *Furman* the decisions were based upon the Eighth Amendment, whereas in *McGautha* the decision was premised purely upon the due process clause.

at 303. See also *Roberts v. Louisiana,* 428 U.S. 325, 334-335 (Stewart, J.).

The viability of *Furman* as authority requiring that in death penalty cases, at least, there must be clear legislative standards to guide the jury in exercising its discretion grew further in *Gregg v. Georgia,* 428 U.S. 153. In the opinion of the Court, Justice Stewart, joined by Justices Powell and Stevens, wrote,

> *Furman* mandates that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action. *Id.,* 428 U.S. at 189.

Mr. Justice White, with whom the Chief Justice and Mr. Justice Rehnquist joined, interpreted the law of *Furman* as follows,

> In *Furman,* this Court held that as a result of giving the sentencer unguided discretion to impose or not to impose the death penalty for murder, the penalty was being imposed discriminatorily, wantonly and freakishly, and so infrequently that any given death sentence was cruel and unusual. *Id.,* 428 U.S. at 220-221.

Thus, it can now be said that the law of the land is that a jury or sentencing judge must receive specific, careful legislative guidelines in order to assist it in its deliberations on whether to impose the death penalty or life imprisonment. The question then is whether the requirement for sentencing standards also exists when the

jury or judge is asked to impose an imprisonment term rather than a death penalty. At first blush, this would seem to be quite an unremarkable extension of the ruling in *Furman, Roberts, Woodson* and *Gregg*. Although those cases had their fundamental underpinning in the Eighth Amendment, they were made applicable to the states through the use of the due process clause of the Fourteenth Amendment. And, at least that portion of those cases that talked about the requirement of sentencing standards was really concerned with the *procedures* utilized in imposing the sentence rather than the inherent nature of the sentence itself. This, of course, is the very essence of the due process clause.

The Fourteenth Amendment to the United States Constitution reads: "nor shall any State deprive any person of *life, liberty,* or property, without due process of law; . . ." (emphasis added). "The Due Process Clause admits of no distinction between the deprivation of 'life' and the deprivation of 'liberty.' " *Furman v. Georgia,* 408 U.S. 238, 414, 447 (Powell, J., dissenting). It would be a radical departure indeed from the proud traditions of this Court if a rule were to be articulated that the fairness of a defendant's trial and the rigors with which it must comply with procedural due process depend upon the severity of the sentence which he receives. See *Thompson v. Louisville,* 362 U.S. 199, 203.

Indeed, in many noncapital cases, this Court has affirmed the due process requirement of standards for the decision maker before he is empowered to deprive a defendant of life, liberty or property. In *Giaccio v. Pennsylvania,* 382 U.S. 399, this Court struck down as vague and in violation of the due process clause a Pennsylvania statute that allowed a jury to assess costs against either the prosecutor or an acquitted defendant. The statute had no standards to assist the jury in deciding against whom such costs should be assessed or in what proportions. This case is similar to the one now before the Court because in both instances the jury discretion arises under a punishment statute rather than a statute defining a substantive crime. Although several Justices would have decided the case on the issue of whether it was appropriate to assess costs against an acquitted defendant, the majority opinion came down squarely upon the proposition that the statute violated due process because it enabled the jury to assess a penalty (a modest fine) without adequate standards to guide it. Justice Black wrote the Court opinion for seven Justices:

> [T]he 1860 Act is invalid under the Due Process Clause because of vagueness and the *absence of any standards* sufficient to enable defendants to protect themselves against arbitrary and discriminatory impositions of costs. *Id.,* 382 U.S. at 402 (emphasis added).
>
> Certainly one of the basic purposes of the Due Process Clause has always been to protect a person against having the Government impose burdens upon him except in accordance with the valid laws of the land. Implicit in this constitutional safeguard is the premise that the law must be one that carries an *understandable meaning with legal standards* that

courts must enforce.[20] *Id.*, 382 U.S. at 403 (emphasis added).

Perhaps the closest case on point is *Rogers v. Britton,* 476 F. Supp. 1036 (E.D. Ark. 1979). There, the petitioner brought a habeas corpus proceeding challenging a jury sentence of life imprisonment following his conviction of first degree rape. The challenge was based upon the argument that under the sentencing statute the jury had unlimited discretion to impose a term from 30 years to life imprisonment, and there were no standards given to assist the jury in exercising this discretion. It was alleged that this violated the Eighth and Fourteenth Amendments. The Arkansas District Court agreed, saying,

> The rub is that the jury in this case was given no guidance in making these distinctions. It was left completely at large, . . . The jury simply announced its verdict as to punishment, giving, of course, no reasons, and was then discharged—an ad hoc body whose reasons for imposing the maximum sentence on petitioner can never be known, and whose decision cannot be rationalized even by reference to some set of standards that were presumably applied. For the

[20] At footnote 8, the Court says that it does not intend to cast doubt on the constitutionality of state practice allowing juries to fix punishment "within legally prescribed limits." *Id.* at 405. Of course, Hicks is not arguing that it is unconstitutional to allow juries to set sentences. Nor is he quarreling with the proposition that such sentences must be "within legally prescribed limits." The point that Hicks raises (and *Giaccio* supports) is that there must be "legally prescribed limits." In *Giaccio* there were no such limits and it was vague and unconstitutional as a result. The same conclusion should be reached here.

> legislature has provided no standards. We cannot know, and the jury could not know, what weight, if any, the General Assembly might have assigned to the defendant's youth, the fact that he used a gun, the absence of aggravated injury, the lack of a prior record, or any other aggravating or mitigating circumstances. *Id.*, at 1039.

That court reviewed the death penalty cases and other recent decisions of this Court and concluded that a lengthy imprisonment term is entitled to the same due process protection of standards to protect against arbitrary jury action.

Other noncapital cases where this Court has held that sentencing procedures must satisfy the full panoply of due process rights that are found at any other stage of the criminal trial include *Mempa v. Rhay,* 389 U.S. 128, 137; *Oyler v. Boles,* 368 U.S. 448, 452; *Townsend v. Burke,* 334 U.S. 736, 740-741. Also cf. *Gardner v. Florida,* 430 U.S. 349, 358, which, although a capital case, uses language which appears to apply to noncapital cases as well. In holding that the due process clause guarantees a defendant right to "notice" at the sentencing stage of his trial, this Court is implicitly saying that there must be articulated "standards" against which his sentence is to be measured. It would be a hollow right indeed to give a defendant notice that he is going to have a sentence imposed against him but to refuse to tell him the standards that will be employed in setting the sentence. This would be like telling him that he is about to enter a boxing ring and then blindfolding him once he gets inside the ropes.

One of the most frequently quoted tenets in sentencing law is that the Legislature, not the courts, has the authority for determining the severity of sentences for various crimes: *Gregg v. Georgia,* 428 U.S. 153, 175-176:

> "[I]n a democratic society legislatures, not courts, are constituted to respond to the will and consequently the moral values of the people." . . . [T]he specification of punishments . . . "are peculiarly questions of legislative policy."

See also *Gore v. United States,* 357 U.S. 386, 393 (1958)

> In effect, we are asked to enter the domain of penology, and more particularly that tantalizing aspect of it, the proper apportionment of punishment. Whatever views may be entertained regarding severity of punishment, . . . these are peculiarly questions of legislative policy.

But permitting standardless sentencing by the court or jury under a statute that authorizes a wide range of punishments runs *exactly counter* to this time-honored principle. When the Oklahoma Legislature allowed Hicks to be punished by a term anywhere from 10 years to life without setting any "legislative policy" to guide a judge or jury in deciding where within this almost total range to set the penalty, it played practically no role whatsoever in determining the actual punishment that Hicks or others similarly situated should receive for their crimes. In reality, the Oklahoma Legislature has abdicated its responsibility and has delegated total responsibility for establishing sentencing policy to the courts. Worse, because that policy is then set on an ad hoc basis and it is

rarely explained in the State of Oklahoma, it is a completely unknowable, ever changing and totally arbitrary policy. In Oklahoma, the defendants' liberty is subject to a government of men, not laws.[21]

The Court's attention is also directed to its post-sentencing cases: *Wolff v. McDonnell,* 418 U.S. 539 (White, J.); *Gagnon v. Scarpelli,* 411 U.S. 778 (Powell, J.); *Morrissey v. Brewer,* 408 U.S. 471 (Burger, C.J.). Each of those cases commanded unanimous support from this Court that when a defendant's parole or probation is revoked or when he loses accrued good time, he is entitled to certain fundamental due process rights, including (1) notice, (2) disclosure of evidence against him, (3) opportunity to be heard and present witnesses, and (4) a statement of the evidence relied upon and reasons for action taken. These due process rights all subsume the right to have knowable, meaningful standards upon which the discretionary judgment of the Parole Board or prison authorities will be exercised. Without knowledge of the standards and basis upon which the judgment will be made to revoke parole, probation or good time, the other rights listed would be totally ineffective. Although it is true that

---

[21] This Court has also held that it will not typically review sentencing discretion as long as it is within the authorized statutory limits. But it will review the *process* by which a sentence was determined. *Dorszynski v. United States,* 418 U.S. 424, 443, and it may reach any sentence reached in error. *Coleman v. United States,* 357 F.2d 563, 570 (D.C. Cir. 1965). How is this Court to know what process was used to reach a sentence and how is this Court to know if the sentence was based upon error if the sentence may be determined in secret and presented without explanation?

these cases speak to when parole, probation or good time is revoked, it would make no sense whatever constitutionally to guarantee a defendant greater rights upon the reinstatement of his sentence than when the sentence is imposed in the first instance. *Morrissey v. Brewer, supra,* 408 U.S. at 480; *Wolff v. McDonnell, supra,* 418 U.S. at 555, 557; *Gagnon v. Scarpelli, supra,* 411 U.S. at 781.[22]

In the case of *Mathews v. Eldridge,* 424 U.S. 319, 335, this Court articulated a three-stage test to determine whether governmental procedures violated the due process clause. First, there must be an analysis of "the private interest that will be affected by the official action." Here the private interest of Hicks that is affected by the official action of sentencing is his liberty interest—to the extent of 40 years of his life. Surely, this is one of the most fundamental interests recognized in the United States Constitution. *Morrissey v. Brewer,* 408 U.S. 471, 482.

Second, there must be an analysis of the "risk of an erroneous deprivation of such interest through the procedures used." Without clear standards to guide the judge or jury in sentencing, there are enormous risks that petitioner and other defendants will be erroneously deprived

[22] Even in matters involving property rights, which surely cannot rise to any higher level of protection than "liberty" rights under the due process clause, this Court has often required articulated standards to govern the discretionary power of the decision-making entity. In *Goldberg v. Kelly,* 397 U.S. 254, this Court required that New York City provide advance notice of the "reasons for the proposed termination" of the welfare payments, *Id.,* 397 U.S. at 267-268. Cf. *Yick Wo v. Hopkins,* 118 U.S. 356, 30 L.Ed. 220, 225-226.

of their liberty. The judge or jury may rely on erroneous factors or simply give way to passion or prejudice. And, without standards, there can be no meaningful appellate review of the action taken by the sentencing authority. Careful instructions and detailed standards are required in the guilt-fixing stage of the trial for these very reasons. Why is the sentencing stage any different? Often where guilt is clear the sentencing stage is actually the more important stage insofar as the defendant is concerned.

Finally, there must be an analysis of the additional "fiscal and administrative burdens" if further procedural rights are imposed. This Court has already required clear standards to guide discretion in imposing the death penalty, and that has not seemed to impose any undue hardship upon the states. It would seem to be no more difficult to require the same kind of standards to control judge or jury discretion in deciding upon a prison term. Certain mitigating or aggravating factors could be listed to justify a sentence near the top or bottom ranges of the allowable punishment when the range is large. Alternatively, if the range of punishment were narrowed, the sentencing discretion might be sufficiently fettered that no further articulated standards would be required. This petitioner would not presume to write such legislation for the State of Oklahoma. But he does ask this Court to say that some greater guide or control on sentencing discretion is needed than is found in 21 O.S. Supp. 1977, § 51(A)—to wit, a range of 10 years to life without any standards whatsoever. That statute should be struck down as unconstitu-

tional in violation of the due process clause of the Fourteenth Amendment.

D. The Court of Criminal Appeals Violated Due Process When It Failed To Offer Any Rationale or Basis For the Sentence That It Imposed Against Petitioner.[23]

This Court has often held that where important constitutional rights are involved, due process requires the establishment of procedures adequate to permit appellate review of the process affecting such rights. See *McGautha v. California,* 402 U.S. 183 at 256 (Brennan, J., dissenting),

> [W]here federally protected rights are involved, due process commands not only that state procedure be adequate to assure a fair hearing of federal claims, . . .but also that it provide adequate opportunity for review of those federal claims where such review is otherwise available.

See also *Gregg v. Georgia,* 428 U.S. 153, 195; *Boykin v. Alabama,* 395 U.S. 238, 242-244; *Jackson v. Denno,* 378 U.S. 368, 387; *Goldberg v. Kelly,* 397 U.S. 254, 271; *Garner v. Louisiana,* 368 U.S. 157, 173.

---

[23] This brief does not address whether juries should also be required to set forth reasons for the sentences they impose because petitioner here was ultimately sentenced by a court, rather than a jury. Furthermore, there may be valid reasons not to extend this rule to juries because of the greater difficulty that juries may have in articulating their collective reasoning. Additionally, the fact that they are a collective body and reflect community standards provides some independent assurance to a defendant that his sentence is not based upon the arbitrariness or capriciousness of a single individual. *Duncan v. Louisiana,* 391 U.S. 145, 158.

Specifically applying this requirement to sentencing procedures, this Court has unanimously held that the court must issue findings adequate to make meaningful any appeal that is allowed. See *Specht v. Patterson*, 386 U.S. 605, where this Court ruled unconstitutional a one-day to life sentence imposed under the Colorado Sex Offenders Act because due process was not followed in the separate sentencing procedures.

> Under Colorado's criminal procedure, here challenged, the invocation of the Sex Offenders Act means the making of a new charge leading to criminal punishment. *The case is not unlike those under recidivist statutes where an habitual criminal issue is "a distinct issue".* . . . Due process . . . requires that he be present with counsel, have an opportunity to be heard, be confronted with witnesses against him, have the right to cross-examine, and to offer evidence of his own. *And there must be findings adequate to make meaningful any appeal that is allowed. Id.* at 610 (emphasis added).

In a great many other contexts as well, where the defendant's rights are less well protected than they are in the sentencing stage of a trial, the Court has frequently affirmed the need for a written explanation justifying the punishment imposed upon the defendant. See *Morrissey v. Brewer,* 408 U.S. 471 at 489 (Berger, C.J.) ("[Minimum requirements of due process include] (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking parole."); *Gagnon v. Scarpelli,* 411 U.S. 778 at 786 (Powell J.); *Wolff v. McDonnell,* 418 U.S. 539, 563 (White, J.) ("[Minimum requirements of pro-

cedural due process require] . . . a written statement of the factfindings as to the evidence relied upon and the reasons for the disciplinary action taken [in reducing good time credits].") If "minimum requirements of procedural due process" require a written statement of the evidence and reasons relied upon in reinstating a criminal sentence, then *a fortiori,* it seems that a similar statement of evidence and reasoning relied upon should be required when such sentence was initially imposed. See also *United States v. Ammidown,* 497 F.2d 615 (D.C. Cir. 1973) (trial judge was required to state his reasons for rejecting a plea bargained by the defendant and the prosecutor so that Appellate Court could review that rejection for abuse of discretion); *Goldberg v. Kelly,* 397 U.S. 254 at 271.

Similarly, in *North Carolina v. Pearce,* 395 U.S. 711, this Court held that "In order to assure the absence of such a motivation [of vindictiveness against the defendant because of his appeal], we have concluded that whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear. . . . And the factual data upon which the increased sentence is based must be made part of the record, so that the constitutional legitimacy of the increased sentence may be fully reviewed on appeal." *Id.*, 395 U.S. at 726.

There is a risk of constitutional error in almost every sentence. Sometimes that constitutional error is vindictiveness or prejudice; other times it is failure to follow the proper law; other times it is reliance upon innaccurate factual information by the sentencing authority. If written

reasoning is needed to help guard against vindictiveness, it is equally needed to guard against the other kinds of constitutional errors that can creep into the sentencing process.

In fact, the annals of this Court's opinions and the opinions of lower appellate courts are replete with occasions of error in the sentencing process which were detected only by happenstance when the sentencing judge volunteered reasons and opinions for his sentence. *E.g.: United States v. Tucker,* 404 U.S. 443 (judge relied upon prior convictions which had been unconstitutionally secured without the benefit of counsel); *Townsend v. Burke,* 334 U.S. 736 (judge made facetious comments and relied upon inaccurate information as to the defendant's background); *Gardner v. Florida,* 430 U.S. 349 (judge relied upon a presentence report which he failed to show to the defendant or his counsel);[24] *United States v. Lewis,* 392 F.2d 440 (4th Cir. 1968) (judge based sentence upon an erroneous belief that he had to impose the maximum sentence authorized under the statute, whereas in reality he had discretion to impose a lesser sentence); *Coleman v. United States,* 357 F.2d 563 (D.C. Cir. 1965) (judge applied the wrong burden of proof); *Scott v. United States,* 419 F.2d 264 (D.C. Cir. 1969) (judge admitted prejudice against defendants who maintained their innocence after

---

[24] If a presentence report must be made part of the appellate record so that the appellate court can review whether the trial court accurately exercised its sentencing discretion, would not a requirement of a written reasoned opinion explaining the sentence be of ever so much more value to an appellate court in safeguarding the defendant's constitutional rights?

conviction). In every one of these cases, it was purely fortuitous that the constitutional error was caught. One must wonder how many other times serious constitutional errors are not caught merely because the sentencing judge has kept his reasoning to himself. This is appeal by luck, not law.

Once again, we turn to the tripartite test of *Mathews v. Eldridge,* 424 U.S. 319, 335, and *Goldberg v. Kelly,* 397 U.S. 254, 263-271, to evaluate whether due process requires a sentencing judge to state the reasoning behind his sentence: First, what is the nature of petitioner's private interest affected by the official action? Here again petitioner's interest is his liberty interest—he may have to spend the next forty years of his life behind bars. There is no doubt that the liberty interest in receiving only a constitutional sentence is one of the most fundamental rights protected by the United States Constitution. *Morrissey v. Brewer,* 408 U.S. 471, 482; *Wolff v. McDonnell,* 418 U.S. 539, 556-557.

Second, would "additional or substitute procedural safeguards" help protect petitioner's constitutional interest? One of the fundamental roles of due process is to provide regular procedures adequate to call to the attention of the appellate court in an orderly way errors in the criminal process. Yet, in one enormously important part (and often the most important part) of the criminal process—the sentencing process—there are no such effective procedures at this time.This Court has come a long way over the last 20 years to bring due process to the guilt stage of the trial. However, its appellate review of the constitu-

tionality of sentencing is still largely based upon luck and happenstance. Requiring the sentencing judge to articulate his reasoning for imposing the sentence entered would certainly give this Court a basis for reviewing the constitutional underpinnings of the sentence and it would bring out in the open what is now done in secret. Further, and quite apart from facilitating appellate review, requiring a judge to articulate the reasoning for his sentence will better focus his own thought process and will undoubtedly reduce the number of sentences in the first place that are imposed on an unconstitutional basis. *Dorszynski v. United States,* 418 U.S. 424, 455 (Marshall, J., concurring).[25]

Third, the benefit must be weighed against the additional "fiscal and administrative burdens" that the additional procedures would require. There is no doubt that there will be some inconvenience if the sentencing judge is required to articulate his reasons. However, this inconvenience should be slight. If the judge has already formulated his reasoning and rationale before deciding upon a sentence, it should be a simple matter to require that reasoning and rationale to be written down or stated on the open record. Petitioner is not asking for formal fin-

---

[25] Although *Dorszynski* did not require the sentencing judge to set forth reasons supporting his finding that a youth offender would not benefit from treatment under the Youth Corrections Act, that holding was limited to the statutory interpretation of the Youth Corrections Act. The Court expressly declined to consider whether there is a constitutional requirement to set forth reasons supporting a sentence because that issue was not properly before the Court. *Id.,* 418 U.S. at 431, n. 7.

dings of fact and conclusions of law; just a simple statement of the basic reasons and evidence relied upon in imposing the sentence should be sufficient. On the other hand, if the sentencing judge has not completed his own thought process to the point that he can identify the reasons for imposing the sentence, there is a great risk that that sentence will be based in part upon irrational factors, erroneous information, or prejudice. It is precisely those cases that this Court should try to ferret out by the requirement of insisting that the trial judge go through the procedural steps of formulating and expressing the reasons for the sentence. And, where constitutional rights are involved, it is important that adequate procedures be established to protect those rights even though some slight additional cost to the state is required. See *Bell v. Burson,* 402 U.S. 535 at 540-541; *Shapiro v. Thompson,* 394 U.S. 618, 633. Further, this Court has already required express reasoning or findings to support sentencing discretion in other areas and it has not seemed to cause any undue hardship. See *Gregg v. Georgia,* 428 U.S. 153, *North Carolina v. Pearce,* 395 U.S. 711.

Weighed against this slight additional burden to the state, the benefit to the defendants involved would be great. No longer will they be left wondering why their loss of liberty is of so little consequence to the sentencing judge as not to warrant even a single sentence of explanation. This Court has often acknowledged that an important part of rehabilitation is to persuade a defendant that his punishment is fair and should be accepted. *Morrissey v. Brewer, supra,* 408 U.S. 471, 484; *Greenholtz v. Inmates,*

____ U.S. ____, 99 S.Ct. 2100 at 2117-2118 (Marshall dissenting in part). See also *Joint Anti-Fascist Refugee Committee v. McGrath,* 341 U.S. 123, 171-172 (Frankfurter, J., concurring).[26]

It is axiomatic that all of us better accept that which we understand. We understand better that which is explained to us. When dealing with a right as precious as liberty, is it beyond the pale of the Constitution to require, for the dignity of the defendant's liberty, for the preservation of the appearance of impartiality by the courts, and for the rehabilitation of the defendant involved, that a simple explanation be required of the sentencing judge for the sentence imposed?

E. The Court of Criminal Appeals Violated Due Process When It Affirmed and Resentenced Petitioner Under A Different Statute Than the One Relied Upon At Trial.

At the trial the jury was instructed as follows:

> You are instructed that as to the defendant Flynn Noye Hicks the law provides that every person who, having been twice convicted of felony offenses, commits a third, or thereafter, felony offenses within ten (10) years of the date following the completion of the

---

[26] See also ABA Project on Minimum Standards For Criminal Justice, *Standards Relating to Sentencing Alternatives and Procedures,* par. 5.6.; ABA Project on Standards for Criminal Justice, *Appellate Review of Sentences,* pp. 2-3; Berkowitz, *The Constitutional Requirement for a Written Statement of Reasons and Facts in Support of the Sentencing Decision: A Due Process Proposal,* 60 Iowa L. Rev. 205, 235 (1974); Kaufman, *The Sentencing Process and Judicial Inscrutability,* 49 St. Johns L. Rev. 215, 221-222 (1975); Hennessey, *Disparity in Sentencing,* 3 New England J. Prison L. 5, 9-11.

execution of the sentence, *shall be* punished by imprisonment in the State Penitentiary for a term of twenty (20) years plus the longest imprisonment for which the said third or subsequent conviction was punishable, had it been a first offense.

Under the facts of this case this means that *should you find that this defendant has been twice convicted of felony offenses* and that he committed the present offense within ten years of the completion of both of the previous offenses, then you *shall assess* his punishment at forty (40) years imprisonment in the State Penitentiary."[27] (emphasis added.) (A. 9)

Consequently, provided the jury found Hicks guilty of two prior felonies, the case was submitted to the jury only under § 51(B) as the exclusive and controlling statutory provision. This was reinforced by the prosecuting attorney, who argued to the jury that there wasn't any alternative; the legislature mandated a 40-year term and the jury must return a 40-year verdict if it found petitioner guilty of two prior felonies (A. 20, 25).

The jury did find that Hicks had committed two prior felonies and, in accordance with the judge's mandatory instruction under § 51(B), it returned a 40-year sentence against petitioner.[28]

---

[27] This is, of course, the statutory language of § 51(B). The maximum penalty permitted under the substantive offense of selling heroin was 20 years. 63 O.S. 1976 2-401. That 20 years, when added to the additional 20 years mandated by § 51(B), equals the 40 years which the court instructed would have to be the jury verdict.

[28] The jury verdict read, "We, the jury, empaneled and sworn in the above entitled cause, do, upon our oaths, find the defendant Flynn Noye Hicks guilt of Unlawful Distribution of a Controlled Dangerous Substance, after having been previously convicted of two felony offenses and assess his punishment at imprisonment in the State Penitentiary for a term of forty (40) years. (A. 40)

Upon appeal to the Oklahoma Court of Criminal Appeals, that court recognized that petitioner had been convicted and sentenced under § 51(B) and it then proceeded to find that statute unconstitutional.

> Defendant asserts in his fourth assignment of error that 21 O.S. Supp. 1977, § 51(B), under which he was sentenced, is unconstitutional. We agree. (A. 58)

Faced with this record, the Oklahoma Court of Criminal Appeals simply decided that the expedient thing would be for it to sentence Hicks under a different habitual criminal statute, § 51(A), even though the jury had not premised its sentence on that statute and, indeed, had been instructed that it could not even consider any statute other than § 51(B) in the event it found Hicks guilty of two prior felony convictions (A. 57-60).

There can be no doubt that § 51(A) is a "penal" statute because it was the statute relied upon by the Court of Criminal Appeals in sentencing petitioner to 40 years imprisonment. See *Trop v. Dulles,* 356 U.S. 86, 97; *Giaccio v. Pennsylvania,* 382 U.S. 399, 402.

Nor can there be any doubt that § 51(A) and § 51(B), under which petitioner was tried and convicted below, differ in important and material respects. Section 51(A) is a discretionary statute, allowing sentencing of anywhere from 10 years to life. Section 51(B) is a mandatory statute requiring a 40-year sentence. Under § 51(A) petitioner

should have had a chance to present mitigating circumstantial evidence, a presentencing report prepared before sentencing, and an opportunity to argue for discretionary sentencing leniency. Section 51(B), however, allowed petitioner none of those rights or opportunities. Where mitigating evidence had not been relevant under § 51(B), petitioner should have been given a chance to come forward with such evidence when resentenced under the discretionary § 51(A). *Saunders v. Shaw,* 244 U.S. 317.

Furthermore, when the Oklahoma Court of Criminal Appeals did sentence Hicks under § 51(A), it represented a brand new sentencing decision under a totally different sentencing statute. It was not merely a modification of a sentence issued below. As has been noted previously a sentence under an unconstitutional statute is void and of no effect. *Brown v. State,* 24 P.2d 1013 (Okl.Cr. 1933); *Karns v. State,* 224 P. 373 (Okl.Cr. 1924); *Ex Parte Lange,* 18 Wall 163, 85 U.S. 872, 879. Thus, the Oklahoma Court of Criminal Appeals started with a fresh slate.

Finally, the Oklahoma Court of Criminal Appeals invoked § 51(A) and issued a 40-year sentence thereunder against petitioner without any warning whatever, without hearing or notice to petitioner, without giving petitioner any opportunity to present mitigating evidence, without a presentence report, and without giving petitioner or his counsel any opportunity at any time in the entire criminal proceeding to plead for sentencing leniency. This sentence was imposed against petitioner for the first time at the very end of a long criminal process in the fourth from the last paragraph of the Opinion of the Court of Criminal Appeals affirming his conviction.

It is petitioner's contention that he was denied due process of law when the Court of Criminal Appeals convicted and sentenced him under a different statute than the one under which he was convicted and sentenced below.

This is not the first time that the Oklahoma Court of Criminal Appeals has decided to affirm a conviction upon a statute different from that upon which the trial below was conducted. In *Eaton v. Tulsa,* 415 U.S. 697, this Court in a per curiam opinion struck down an Oklahoma conviction where the defendant at the trial was convicted of contempt of court for using an obscenity. The Court of Criminal Appeals concluded that this one expletive might be insufficient to support a contempt charge, but that the defendant had also been "discourteous" in the courtroom in other matters as well. The Oklahoma Court of Criminal Appeals then concluded that "coupling defendant's expletive with the discourteous responses, it is this Court's opinion there was sufficient evidence upon which the trial court *could* find defendant was in direct contempt of the court." *Id.*, 415 U.S. at 698. This Court reversed that conviction saying,

> However the question is not upon what evidence the trial judge *could* find petitioner guilty but upon what evidence the trial judge *did* find petitioner guilty. . . .The Court of Criminal Appeals thus denied petitioner constitutional due process in sustaining the trial court by treating the conviction as a conviction upon a charge not made. *Id.*, 415 U.S. at 698-699.[29]

---

[29] Notwithstanding this admonition, the Oklahoma Court of Criminal Appeals has continued its practice of upholding a conviction

This Court has long held that it violates due process to convict a defendant under a charge other than the one upon which he was tried below. In *Cole v. State of Arkansas,* 333 U.S. 196, the Court was faced with a situation where the defendant was charged and convicted at trial under one section of an Arkansas statute but on appeal the Arkansas Supreme Court upheld the conviction under a different section of the same statute on the basis that there was adequate evidence at trial to have warranted a conviction under the second section. This Court held that to be unconstitutional, saying,

> To conform to due process of law, petitioners were entitled to have the validity of their convictions appraised on consideration of the case as it was tried

---

upon charges and evidence different from that upon which the lower court verdict was based. See *Breshers v. State,* 572 P.2d 561 (Okl.Cr. 1977). There, the court found constitutional defects in the defendant's conviction of second degree murder. However, instead of remanding for a new trial, it concluded that, "it is the opinion of this Court that the interests of justice will be served best by vacating the judgment and sentence for Second Degree Murder and remanding this case to the District Court with instructions to enter a new judgment and sentence finding the defendant guilty of Manslaughter in the First Degree and imposing sentence on defendant of twenty-five (25) years under the direction and control of the Department of Corrections." It mattered not to the Court of Criminal Appeals that the defendant was not charged with manslaughter in the first degree. Indeed, such an instruction had been tendered and rejected. (See certified copies of those jury instructions on file with the clerk of this Court.) Nor was the jury there allowed an opportunity to reach its own judgment about what kind of sentence the defendant should have received under first degree manslaughter.

> and as the issues were determined in the trial court. *Id.*, 333 U.S. at 202.

See also *DeJonge v. Oregon,* 299 U.S. 353, 362.

This principle was extended to the sentencing process in *Presnell v. Georgia,* 439 U.S. 14. There, at the sentencing stage of trial the jury returned a death penalty upon a finding that the crimes upon which the defendant was convicted had been committed in conjunction with certain other supporting crimes. The Georgia Supreme Court found error in relying upon the supporting crimes set forth as justification for the jury verdict of death, but it did find adequate evidence that could have supported the finding of a different supporting crime to warrant the death penalty. Based upon this new supporting crime, the Georgia Supreme Court affirmed the death penalty.

This Court, in a per curiam opinion, held that that procedure violated defendant's due process rights.

> "It is as much a violation of due process to send an accused to prison following conviction of a charge on which he was never tried as it would be to convict him upon a charge that was never made. . . . To conform to due process of law, petitioners were entitled to have the validity of their convictions appraised on consideration of the case as it was tried and as the issues were determined in the trial court." [Citations omitted.]
>
> These fundamental principles of procedural fairness apply with no less force at the penalty phase of a trial in a capital case than they do in the guilt determining phase of any criminal trial. 439 U.S. 14, 58 L.Ed.2d 207 at 211.

Although *Presnell* was a capital punishment case, it is inconceivable that such "*fundamental* principles of procedural fairness" would not apply with equal force at the penalty stage of a trial where a defendant may forfeit 40 years of his life. See *Mempa v. Rhay,* 389 U.S. 128; *Specht v. Patterson,* 386 U.S. 605; *Gardner v. Florida,* 430 U.S. 349, 358, *Furman v. Georgia,* 408 U.S. 238 at 414, 447 (Powell, J., dissenting) ("The Due Process Clause admits of no distinction between the deprivation of 'life' and the deprivation of 'liberty.' ").

The most recent occasion that this Court has had to consider a situation where the appellate court attempted to uphold a conviction upon grounds different from those which formed the basis of the conviction at the trial level was the case of *Dunn v. United States,* ____ U.S. ____, 47 L.W. 4607 (June 4, 1979). In that case, the Court unanimously held (Justice Powell taking no part in the consideration or decision of the case) that it violated due process when a defendant was convicted of perjury at the trial based upon one statement and his conviction was affirmed on appeal based upon the same statement but made at a different place and time. The Court concluded that,

> [A]ppellate courts are not free to revise the basis on which a defendant is convicted simply because the same result would likely obtain on retrial.

In short, the law is clear that an appellate court may not uphold a conviction or sentence upon ground different than those relied upon to support the conviction and sentence below. If anything, what happened to petitioner was even more a violation of his due process rights because

the Oklahoma Court of Criminal Appeals didn't simply try to uphold the lower sentence upon different grounds; it duplicated the prior void sentence and issued it as a brand new sentence against him upon a basis that was directly contrary to the jury instruction given below. *Cf. In re Oliver,* 333 U.S. 257.

II. It Was Cruel and Unusual Punishment in Violation of the Eighth Amendment To Sentence Petitioner to 40 Years Imprisonment Under 21 O.S. Supp. 1977, § 51(A).

A. Punishment Under 21 O.S. Supp. 1977, § 51(A) Is Cruel and Unusual Because It Makes No Measurable Contribution To Acceptable Goals of Punishment, But Rather Constitutes Only The Needless Imposition of Pain and Suffering.

It is now well established that the Eight Amendment, as applied to the states through the Fourteenth Amendment, prohibits punishments that are "excessive" in relation to the crime committed.[30] *Coker v. Georgia,* 433 U.S.

---

[30] Petitioner is *not* here advancing the argument that 40 years imprisonment is so long that it *must* under any circumstances be regarded on its face as excessive for punishment of one sale of heroin following two prior felony convictions. Compare *Rummel v. Estelle,* 587 F.2d 651 (1968), *cert. granted,* 60 L.Ed. 1064 (May 21, 1979). Rather, petitioner is arguing that *this* sentence under *this* particular statute is "excessive" (and indeed even a far shorter sentence would be "excessive") *because* the sentence makes no measurable contribution to acceptable goals of punishment and because it was imposed in a feckless and arbitrary way. *Furman v. Georgia,* 408 U.S. 238, 306-310 (Stewart, J., concurring). *Id.* at 310-314 (White, J., concurring); *Robinson v. California,* 370 U.S. 660, 667. As a result, it is not

584 at 592; *Gregg v. Georgia,* 428 U.S. 153 at 173; *Furman v. Georgia,* 408 U.S. 238, 243 (Douglas, J., concurring); *Id.* at p. 457 (Powell, J., dissenting).

This principle is not limited to capital offenses, but applies also to sentences of imprisonment that are excessive and out of proportion to the offenses involved. *Weems v. United States,* 217 U.S. 349, 367, 368; *Trop v. Dulles,* 356 U.S. 86, 100; *Robinson v. California,* 370 U.S. 660, 676 (Douglas, J., concurring); *O'Neil v. Vermont,* 144 U.S. 323, 339-340 (Fields, J., dissenting).

This Court has suggested a test to determine when the punishment is excessive to the offense in *Coker v. Georgia,* 433 U.S. 584 at 592. There the Court said:

> [A] punishment is "excessive" and unconstitutional if it (1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than

necessary for the Court to speculate whether petitioner will really be imprisoned for 40 years or whether he might be discharged at an earlier date. However, for the Court's information and to the extent of petitioner's best knowledge and information, Oklahoma allows *no* automatic credit for good behavior while serving time. However, one day of good time may be earned for each day that the inmate participates in a work or education program, and additional good time credits may be earned by giving blood. 57 O.S. Supp. 1979 § 138. The earned good time credits may be lost for bad behavior. Although the parole board must begin to consider each inmate for parole after he has served one-third of his sentence, there is no guarantee that parole will be given at any time since this is purely a matter of discretion with the parole board and the governor. 57 O.S. § 332.7. In any event, parole is both burdensome and hazardous, requiring close scrutiny of the parolee and many restrictions on his life throughout the remaining term of his parole. Pardon and Parole Board Policy No. 005.

> the purposeless and needless imposition of pain and suffering; or (2) is grossly out of proportion to the severity of the crime. A punishment might fail the test on either ground.

See also *Gregg v. Georgia,* 428 U.S. 153, 173. The "measurable contribution" test has also been expressed as a requirement that the penalty be "rationally directed to achieve the legitimate ends of punishment." *Trop v. Dulles,* 356 U.S. 86 (Brennan, J., concurring); *Robinson v. California,* 370 U.S. 660, 678 (Harlan, J., concurring).

It is petitioner's contention that § 51(A), under which he was sentenced, does not "rationally" relate to acceptable goals of punishment or make a "measurable contribution" to such goals.

In order to develop this contention it is necessary first to identify the "acceptable goals" of punishment. This Court has, on various occasions, identified four such goals: (1) rehabilitation, (2) deterrence, (3) isolation, and (4) retribution.[31] *Trop v. Dulles,* 356 U.S. 86, 111 (Brennan, J.); *Spencer v. Texas,* 385 U.S. 554 at 571 (Warren, C.J., dissenting); *Furman v. Georgia,* 408 U.S. 238, 342 (Marshall, J., concurring); *Id.* at pp. 451-452, n. 43 (Powell, J., dissenting).

Rehabilitation—Probably the primary justification for enhancing punishment for an habitual criminal is that

[31] There is less agreement about retribution as an acceptable goal than there is about the other goals. *Furman v. Georgia,* 408 U.S. 238 at 342-345 (Marshall, J.); *Id.* at 304-305 (Brennan, J.); *Morissette v. United States,* 342 U.S. 246, 251.

the previous normal range of punishments have proved inadequate to rehabilitate the defendant. *Pennsylvania ex rel Sullivan v. Ashe,* 302 U.S. 51, 54-55 ("Persistence in crime and failure of earlier discipline effectively to deter or reform justify more drastic treatment."); *Moore v. Missouri,* 159 U.S. 673, 677 ("[T]he statute 'imposes a higher punishment for the same offense upon one who proves, by a second or third conviction, that the former punishment has been inefficacious in doing the work of reform for which it was designed;' . . .").

One could therefore conclude that enhanced penalties could not rationally be invoked against a recidivist upon the pretext that the normal penalties had failed to rehabilitate him unless it is first shown that normal penalties had been tried. Specifically, before an enhanced imprisonment term can be justified, there should have to be a showing that a normal range of imprisonment has first been tried upon the defendant.[32] However, the Oklahoma recidivist statute under which petitioner was sentenced does not require that any actual jail time have been served on the prior offenses. And, in fact, petitioner

[32] Indeed, many state and federal statutes require actual time to have been served in the penitentiary before a recidivist penalty can be invoked. See California, P.C. § 667.5 (West Supp. 1978); Connecticut, G.S.A. § 53a-35, 53a-40 (1972 and Supp. 1978); Kentucky, R.S.A. § 532.080 (Supp. 1978); Maryland, A.C. Art. 27, § 643B (Supp. 1978); Massachusetts, M.G.L.A. Ch. 279 § 25 (West 1972); Mississippi, M.C.A. § 99-19-81-83 (Supp. 1978); Montana, R.C.A. § 46-18-501, 502 (1978); Nebraska, R.S. § 29-2221 (1975); New Hampshire, R.S.A. § 651.6 (1974); Rhode Island, G.L. § 12-19-21 (1969); United States, 18 U.S.C. 3575 (1976); Utah, C.A. § 76-8-1001 (1977).

here served *no* time in prison on his prior convictions.[33] This heroin conviction represents the very first effort by the State of Oklahoma to rehabilitate petitioner through imprisonment. But instead of trying a normal jail sentence of 5-20 years as authorized by the dangerous drug statute under which he was convicted, the State invoked the recidivism statute to justify an imprisonment of 40 years for the identical crime that petitioner's codefendant was punished for 5 years.

How can it be "rationally" determined that an enhanced punishment is necessary or even useful if a normal prison term has not been tried first? And if no such case can be made for the need for the enhancement portion of the sentence, is it not simply a "purposeless and needless imposition of pain and suffering"? *Furman v. Georgia,* 408 U.S. 238, 279 (Brennan, J., concurring); *O'Neil v. Vermont,* 144 U.S. 323, 339-341; *Weems v. United States,* 217 U.S. 349, 381; *Coker v. Georgia,* 433 U.S. 584, 609-610 (Burger, C.J., dissenting).[34]

[33] The "judgment and sentence suspended on plea of guilty" for each of petitioner's prior two felony convictions are public records, and true copies have been lodged with the Clerk of this Court. Similarly the Appearance Dockets in both those cases have also been lodged with the Court Clerk and they show that the suspended sentences were never revoked.

[34] Several studies suggest that recidivism statutes are generally ineffective in rehabilitation. See *Recidivist Impacts of Differential Sentencing Practices for Burglary Offenders,* Criminology, pp. 387-396 (Nov. 1977); Rubin, *Law of Criminal Correction* (2d ed. 1973) ("it may be justly said that in the United States the recidivist laws have never been successful."); Brown, *The Treatment of General Recidivist Statutes,* 48 Colum.L.Rev. 238 (1948).

This Court should rule that punishment under a recidivist statute is cruel and unusual unless it is established that the defendant has first received at least one prior jail term for an earlier offense. Otherwise, such punishment may be likened to a situation where parents twice threaten their child with a spanking for telling lies, but each time the threat is not carried out. The third time the child lies, the parents subject him to a terrible whiplashing on the theory that the punishment of spankings has proven ineffective to deter him from lying. Whatever else can be said about the imposition of a recidivist penalty as the first actual jail term, it is not a "graduated" or "proportioned" approach to punishment. *Weems v. United States,* 217 U.S. 349, 367.

Deterrence—The Eighth Amendment requires that, for deterrent purposes, the extent of the punishment be related to the seriousness of the offense. *Powell v. Texas,* 392 U.S. 514, 531-532; *Weems v. United States,* 217 U.S. 349, 367; *Furman v. Georgia,* 408 U.S. 238, 303-304 (Brennan, J., concurring). Here, § 51(A) makes no effort whatsoever to fit the punishment to the crime. A defendant who has previously been convicted of just one prior felony, even a relatively minor felony, may be subject to up to life imprisonment upon the conviction of a second felony, again, even though the second felony is relatively minor. On the other hand, a defendant could accumulate a great many convictions of crimes as serious as first degree manslaughter or second degree rape and receive as little as 10 years under this statute. There is nothing "graduated"

or "proportional" about this punishment and there is no effort to make the punishment fit the crime.[35]

There are many ways that a statute could be written so that it does have some proportionality to the seriousness of the offenses committed. It could multiply the punishment available for the last crime committed[36] or it could simply add a specified number of years to the penalty range of the last offense.[37] It could move the punishment for the last offense to the next higher punishment category.[38] Any rational formula that relates the

---

[35] This argument is specifically directed to § 51(A)(1) under which petitioner was sentenced which allows punishment from 10 years to life upon the subsequent conviction of any felony punishable by five years or more in the penitentiary. Under Oklahoma law, that covers most felonies, including such relatively minor offenses as passing a bad check of $21. 21 O.S. Supp. 1979 § 1514.2. Felonies that are more minor than this are treated differently under § 51(A)(2) which imposes a maximum prison term of 10 years. Section 51(A)(3) deals with attempted felonies.

It does not help to speculate that the jury or sentencing judge may provide the proportionality when they exercise their discretion. Some may, and some may not. As pointed out previously, there are no standards giving them even the slightest hint that they should try for proportionality. There is no general legislative directive that the punishment should fit the crime. As far as § 51(A) is concerned, that factor has no significance. And, as the cases in footnote 18 indicate, there has been no proportionality in practice under § 51(A). The sentences modified thereunder by the Court of Criminal Appeals alone show a freakishness and randomness that brings the entire sentencing process into disrepute.

[36] See, *e.g.*, Arizona, R.S.A. § 13-604, 13-702 to 703 (1979); Kansas C.C. § 21-4504 (Vernon Supp. 1978); Louisiana, C.C.P.A. Art. 15:529.1 (1956 and Supp. 1978).

[37] See, *e.g.*, Wisconsin, S.A. § 939.62 (West 1975 and Supp. 1978).

[38] See, *e.g.*, South Dakota C.L.A. § 22-6-1, 22-7-7-9 (Supp. 1978).

punishment to the crime would be acceptable. However, if the more serious criminals need a threat of greater punishment to deter them (and that is the critical assumption that all recidivist statutes must be based upon or they would make no sense at all under a deterrence analysis) then how can a recidivist statute be said to make a "rational" or measurable" contribution to deterrence if it ignores both the *seriousness* of the crimes involved[39] and the *number* of prior convictions? Isn't it then a bankrupt statute that simply stands as a trap to impose freakish punishments in a whimsical or capricious way without rationality?[40] *Weems v. United States,* 217 U.S. 349, 381.

Isolation—The same comments may be made about isolation as were made about deterrence. Society's interest in isolation should relate to the seriousness of the crimes committed by the defendants being isolated. No such relationship is found in § 51(A).

Retribution—Even assuming retribution is a proper goal of punishment, it too must be proportional to the offense committed. *O'Neil v. Vermont,* 144 U.S. 323, 340 (Field, J., dissenting). Here the statute authorizes punishment all out of proportion to the severity of the offense, and thus invites the infliction of needless pain and suffering beyond that which society could legitimately request in

[39] See footnote 35.

[40] The same point may also be made here as was made with regard to the goal of rehabilitation: unless the state has first tried normal jail terms within the limits prescribed by the regular substantive statutes, how can it be said that enhanced sentences are necessary or even useful to deter recidivists? See the cases cited, *supra.*

retribution.[41] Compare Hick's 40-year sentence to his codefendant's 5-year sentence for exactly the same offense. See *Coker v. Georgia,* 433 U.S. 584, 592.

Thus, it may be seen on its face that 21 O.S. Supp. 1977 § 51(A) is not designed to meet any of the acceptable goals of punishment, and it provides for excessive, irrational, capricious, cruel and unusual punishment. But then one may ask what is the purpose of this Oklahoma statute? What is it, precisely, that the State of Oklahoma intended to punish when it enhanced petitioner's punishment to 40 years? We can assume that Oklahoma was not intending to impose additional punishment for the petitioner's previous crimes, because that would be double jeopardy. *McDonald v. Massachusetts,* 180 U.S. 311; *Graham v. West Virginia,* 224 U.S. 616; *Moore v. Missouri,* 159 U.S. 673. We know also that petitioner was not being punished solely for his single $50 sale of two balloons of heroin because the Oklahoma Legislature has determined that the maximum punishment for that offense, without more, is 20 years. 63 O.S. Supp. 1976, § 2-401(B). The Oklahoma Court of Criminal Appeals has answered our inquiry in previous cases by acknowledging that its statutes punish a recidivist more severely because of his "state" as a prior criminal. *Barger v. Burford,* 225 P.2d 196, 198 (Okl.Cr. 1950), " 'habitual criminality is a *state* and not a crime.' " (Emphasis added.) See also

[41] The appendix in *Thigpen v. State,* 571 P.2d 467 (Okl.Cr. 1977), gives examples such as the verdict of 999 years upon conviction of Robbery with Firearms after a former felony conviction. Other sentences for the same offense varied from 99 years (modified to 50 years); 50 years (modified to 35 years), and 40 years (not modified at all).

Ellison v. Oklahoma, 493 P.2d 837, 840 (Okl.Cr. 1972); *Ex Parte Bailey,* 64 P.2d 278, 280 (Okl.Cr. 1936).[42]

Thus, the enhancement portion of petitioner's penalty is because of his "state" or status as a man with a prior conviction record. The State of Oklahoma has simply made an irrebutable presumption that because petitioner has had one or more prior felony convictions he is a bad person and deserves to be punished more severely.[43] This the State of Oklahoma may not do. *Robinson v. California,* 370 U.S. 660.[44]

B. Petitioner's Sentence is Cruel And Unusual Because It was Inflicted In An Arbitrary and Capricious Manner.

Quite apart from the excessiveness of the punishment, if such punishment is imposed in an arbitrary, capricious

---

[42] Saying that the recidivist statute in Oklahoma does not define a crime is of no significance. It is clearly a penal statute because it imposes punishment. As a penal statute, it must comport with the requirements of the Eighth Amendment whether the State of Oklahoma recognizes it as a crime or not. *Trop v. Dulles,* 356 U.S. 86, 97.

[43] This presumption insofar as petitioner was concerned was irrebuttable in part because the Oklahoma Court of Criminal Appeals never allowed him a hearing or any other opportunity to rebut the presumption that he was a bad man and needed an enhanced term of imprisonment.

[44] This reasoning would not require the wholesale abrogation of recidivist statutes throughout the country. Recidivism statutes that are directed toward proper goals of punishment would be in a different category. But where this Court is faced with an irrational statute that does not appear to be proportionally related to any acceptable goal of punishment and where this Court has the advantage of an interpretation of the statute by the highest court in the state candidly admitting that the incremental punishment is solely because of the defendant's "state" as a man with prior convictions, it must be struck down. *Robinson v. California, supra.*

and freakish manner, it may also be cruel and unusual. *Gregg v. Georgia,* 428 U.S. 153, 188-189; *Furman v. Georgia,* 408 U.S. 238, 249 (Douglas, J., concurring); *Id.,* at 274, 277 (Brennan, J., concurring); *Id.* at 309; *Id.* at 310-314 (White, J., concurring). In essence, this Court has articulated an approach that a punishment may be cruel and unusual not only because of its intrinsic severity but also because of the procedures used in imposing it. Although this Court has never invalidated a sentence short of death because of the procedure under which it was imposed, that would seem to be a logical extension of its previous rulings. In essence this argument incorporates the arguments made under the due process clause except that the petitioner is now asking that the Court also judge the sentencing procedures used against him under the Eighth Amendment.

Petitioner's 40-year sentence was "unusual" in the same sense that being struck by lightning is unusual. *Furman v. Georgia,* 408 U.S. 238, 309 (Stewart, J., concurring). It came without warning from on high. It singled out the petitioner for unusually severe treatment: eight times more severe than his codefendant. And, it was unusual in that the Court of Criminal Appeals reduced most of the other sentences that had been unconstitutionally imposed under § 51(B).[45]

Petitioner's penalty was cruel because of the procedure under which it was issued. As mentioned before,

---

[45] See n. 18, *supra.*

petitioner was not given any opportunity to present any mitigating circumstances or even to make the most elementary plea for leniency or mercy. He was not even allowed to face the sentencing court that has now charted the rest of his adult life. Going into the sentencing process he had no idea what standards the court might use to measure his punishment, and coming out of the process he has no idea what standards or factors were in fact used. The Court of Criminal Appeals has not offered so much as a single word of explanation for his sentence that could serve to rehabilitate him or deter others.

This Court said in *Gregg v. Georgia,* 428 U.S. 153 at 173, 182, that one of the "basic concepts underlying the Eighth Amendment" is that the penalty must "accord with 'the dignity of man'." *Id.* at 173; *Trop v. Dulles,* 356 U.S. 86, 100. Surely 40 years of a man's life is worth some explanation and some right to be heard. The State may have the naked power to take away 40 years of a man's life, but it accords that man no dignity if it does not give him a hearing and if it does not give him an explanation of why such a penalty was imposed upon him. This is the difference between "unrestrained power and that which is exercised under the spirit of constitutional limitations formed to establish justice." *Weems v. United States,* 217 U.S. 349, 381.

III. Petitioner Was Denied Equal Protection of the Law When He Was Classified Under An Admittedly Unconstitutional Statute and Then, Based Upon That Classification, He Was Discriminated Against By Being Denied State and Federal Guaranteed Rights.

At the time that Hicks was tried and convicted, the Oklahoma Habitual Criminal Statute, 21 O.S. Supp. 1977, § 51, had two separate, discrete sections: Sections 51(A) and 51(B). Section 51(A) provided for discretionary sentencing from ten years to life upon the conviction of a felony punishable by five years or more accompanied by proof of a prior felony conviction. Section 51(B) called for mandatory sentencing of the maximum term permitted under the last offense plus 20 years when the last conviction is accompanied by proof of *two* or more prior felony convictions. Petitioner was charged, tried, convicted and sentenced under § 51(B) (A. 4-6, 9, 20, 25, 40, 58).

Following this conviction but before petitioner's appeal was heard, the Oklahoma Court of Criminal Appeals decided *Thigpen v. State,* 571 P.2d 467 (Okl.Cr. 1977). In that decision, the court struck down § 51(B) as unconstitutional. The Appendix which was attached to its opinion makes it clear that § 51(B) was struck down because it violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. The court's reasoning was that § 51(A) and § 51(B) classified all habitual criminals in Oklahoma as either one-time prior offenders or offenders with two or more prior convictions: the one-time prior offenders being sentenced under § 51(A) and those with two or more prior offenses being

sentenced under § 51(B). The analysis proceeded that because § 51(B) set mandatory limits on punishment, whereas § 51(A) allowed discretionary sentencing of anywhere from 10 years to life imprisonment, it was possible for a defendant with one prior conviction to be sentenced to a much more severe sentence than the defendant with two or more prior convictions.[46]

The Appendix to the court's opinion articulated the Fourteenth Amendment test as follows,

> "The equal-protection clause of the 14th Amendment to the Constitution of the United States only requires that classifications made by a municipal legislative body be reasonable, not arbitrary, and rest upon some ground of distinction having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." *Id.* at 475.

The court found that the purpose of the legislation was to punish more severely those with two or more prior offenses than those with only one prior offense. Yet, § 51(B), when compared to § 51(A), did not reasonably relate to this legislative purpose because under § 51(A) there was "the possibility, and indeed the probability" of a greater punishment than under § 51(B). Because this

[46] The *Thigpen* case pointed this out graphically because that case involved two defendants who were tried for the same crime. One of the defendants had one prior conviction and the other had two. Although in that case both defendants had been proceeded against under § 51(A) and both had received discretionary jail terms of 67 years, had the defendant with two prior convictions been proceeded against under § 51(B) as he was claiming he had a right to be, his maximum mandatory sentence would have been only 27 years.

classification of those charged as habitual criminals into two groups pursuant to §§ 51(A) and 51(B) was not rationally related to the legislative purpose, the court struck down § 51(B) as unconstitutional. This meant that all habitual offenders had to be proceeded against under § 51(A).

When petitioner's case finally came to the Court of Criminal Appeals, it agreed that petitioner had been improperly sentenced under an unconstitutional statute. The effect of this is that petitioner's prior sentence was void. *In re Lange,* 18 Wall 163; *Brown v. State,* 24 P.2d 1013 (Okl.Cr. 1933);*Karns v. State,* 224 P. 373 (Okl.Cr. 1924). But instead of remanding the case to the district court jury for a new sentencing trial, the Court of Criminal Appeals simply imposed a new sentence upon petitioner itself under § 51(A).

The classification upon which petitioner relies to establish his equal protection argument is the classification that existed at the time of his trial wherein defendants with one prior conviction were prosecuted under § 51(A) and those with two or more prior convictions (like petitioner) were prosecuted initially under § 51(B). This classification has already been held to be irrational, illegal and unconstitutional. *Thigpen v. State,* 571 P.2d 467 (Okl.Cr. 1977).

The discrimination that petitioner claims flowed as a result of this illegal classification is that, while those who were initially sentenced under § 51(A) were afforded their statutory right to jury sentencing,[47] those who were initial-

[47] See, *e.g.*, *Fischer v. State*, 593 P.2d 507 (Okl.Cr. 1979); *Burney v. State,* 594 P.2d 1226 (Okl.Cr. 1979).

ly sentenced illegally under § 51(B) and resentenced under § 51(A) by the Oklahoma Court of Criminal Appeals were denied this right. They were also denied a hearing or any other opportunity to present mitigating circumstances going to the proper exercise of sentencing discretion.[48] The Oklahoma Court of Criminal Appeals substituted its discretion for that of a jury in imposing its own sentence under § 51(A).[49]

The traditional standard under which an Equal Protection analysis must proceed is stated as follows in *Royster Guano Co. v. Virginia,* 253 U.S. 412, 415 (1920),

> [T]he classification must be reasonable, nor arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.

This is, of course, the same test employed in *Thigpen,* and under that test this classification has already been declared unconstitutional. The classification of prosecuting habitual criminals with one prior conviction under § 51(A) and those with two or more prior convictions under § 51(B) is not reasonable; it is arbitrary; it is

[48] See fn. 18, *supra.*

[49] The jury that should have sentenced petitioner, had he been correctly charged in the first place under § 51(A), exercised its discretion to return the lowest sentence permissible against his codefendant for commission of the same crime. Had it been able similarly to exercise its discretion in sentencing petitioner under § 51(A), petitioner might have received a 10-year sentence rather than the 40-year sentence imposed by the Court of Criminal Appeals. The loss of this opportunity represents a significant injury to petitioner.

unfair; and it bears no substantial relation to the purpose of the legislation. *Thigpen v. State,* 571 P.2d 467 (Okl.Cr. 1977).

As illogical and irrational as it may have been initially to proceed against one class of habitual criminals under § 51(A) and another class under § 51(B), it is totally and absolutely irrational and arbitrary to use this classification to determine who shall, and who shall not, be entitled to jury sentencing and a hearing before sentencing. What possible legitimate, rational state objective could there be to choose to deprive one group of habitual criminals of their right to a hearing and jury sentencing on the sole basis that they had been previously prosecuted by the state under an unconstitutional statute?[50] If anything, once it has been

[50] The State of Oklahoma has not tried to justify this discrimination on the basis of a fiscal argument, and indeed it could not do so. This Court has often observed that such considerations are not overriding when equal access to important procedural rights are involved. *Griffin v. Illinois,* 351 U.S. 12; *Douglas v. California,* 372 U.S. 353. As this Court recognized in *Shapiro v. Thompson,* 394 U.S. 618, 633, "[A] State has a valid interest in preserving the fiscal integrity of its programs. It may legitimately attempt to limit its expenditures, whether for public assistance, public education, or any other program. But a State may not accomplish such a purpose by invidious distinctions between classes of its citizens . . . The saving of . . . costs cannot justify an otherwise invidious distinction."

Indeed, since it was the State itself that created the unconstitutional classification in the first place, it can scarcely complain that it must now bear the cost of a second jury sentencing procedure to correct the error.

In any event, the cost to the State of Oklahoma to provide a hearing and resentencing by a jury for all defendants unconstitutionally sentenced under § 51(B) and resentenced under § 51(A) by the Court

determined that a state has effected an unconstitutional classification, it should take steps to remedy and eradicate the unconstitutional classification. *Swann v. Charlotte-Mecklenburg Bd. of Ed.,* 402 U.S. 1. Oklahoma did just the opposite. Having found that it had created an unconstitutional classification, it compounded the injury by telling those who were illegally classified (and who had already been forced through one unconstitutional sentencing proceeding) that that classification was to be used again, this time to deny them their State-guaranteed right to be sentenced by a jury[51] and their federal right to a hearing before sentencing. This resulted in an unconstitutional discrimination against them.

What has already been said is surely enough to establish a violation of petitioner's equal protection rights under the rational basis test. However, for this Court's additional consideration if it deems it necessary, petitioner also advances the argument that the Oklahoma Habitual Criminal Statute should be subject to "strick scrutiny"

---

of Criminal Appeals cannot be great. Section 51(B) was enacted in 1976 and did not become effective until May 10, 1976. By November 15, 1977, the Oklahoma Court of Criminal Appeals had declared § 51(B) unconstitutional in *Thigpen v. State,* 571 P.2d 467 (Okl. Cr. 1977). Thus, such a ruling would only affect a limited number of habitual criminals who were originally and erroneously tried and sentenced under § 51(B).

[51] It is true that a State is not required by the federal Constitution to provide jury sentencing. Nevertheless, when a State does grant jury sentencing it may not do so in a way that discriminates against some habitual criminals on the basis of an unconstitutional and irrational classification. *Cf. Griffin v. Illinois,* 351 U.S. 12, 18.

because it rests upon a suspect classification and because it impinges upon petitioner's fundamental liberty interests.

The list of classifications that this Court has held to be "suspect" to date is not very long and the list is obviously not yet fully developed: *E.g.,* race, *Loving v. Virginia,* 338 U.S. 1; alienage, *Graham v. Richardson,* 403 U.S. 365; and illegitimacy, *Glona v. American Guarantee & Liability Ins.,* 391 U.S. 73.

The common factor in the "suspect" classifications appears to be that they are based on involuntary characteristics. An individual has no voluntary control over his race, alienage or legitimacy. By contrast, when the individual is thought to have some control or influence over the characteristics which form the basis for the classification, such classifications have not been considered suspect. For example, although poverty is not necessarily voluntary, there is apparently enough of a possibility that one may influence his own economic status that wealth has been held not to be a suspect classification. *San Antonio School Dist. v. Rodriguez,* 411 U.S. 1. See *United States v. Kras,* 409 U.S. 434.

The classification of sex presents an interesting study in this analysis because some sex-related characteristics like pregnancy are voluntary, and there the Court has apparently not considered the classification to be suspect. *Geduldig v. Aiello,* 417 U.S. 484. However, where gender alone in involved, the Court, while sometimes articulating the language of the rational basis test, has appeared to have applied a heightened form of scrutiny. *Reed v. Reed,* 407 U.S. 71; *Frontiero v. Richardson,* 411 U.S. 677; *Craig v. Boren,* 429 U.S. 190.

Although petitioner admits this test is not perfect or infallible, it does appear to offer some rough guide as to which additional classifications may be suspect. Using this guide, it can be said that petitioner was placed in a suspect classification. Petitioner surely had no control over the fact that the state chose to classify those charged with habitual criminal offenses in an unconstitutional manner. No one asked petitioner if he would have preferred to be prosecuted under § 51(A) rather than § 51(B).[52]

Not every improper state classification need form the basis for a suspect classification but, when the state's highest court has already concluded that the classification was "unconstitutional" under the Fourteenth Amendment, are we to pretend that that classification is not then at least "suspect"? Indeed, at that point, the classification has passed beyond the "suspect" stage; it has already been tried and found unconstitutional. If the state *thereafter* continues to use that classification to discriminate and deprive one group of people of their constitutional rights, ought not that further act of discrimination at least be subject to strict scrutiny?

---

[52] Although it might be asserted that the petitioner did have some control over the decision to commit the prior offenses in the first place, that would miss the point. The illegal classification and discrimination here is not between those who have and have not committed prior offenses. It is between those with prior offenses who were sentenced under § 51(A) and those with prior offenses who were unconstitutionally sentenced under § 51(B). This classification was dictated by state law at the time petitioner was charged and tried and he had no control over that classification.

Finally, petitioner would suggest that his liberty interest threatened by a lengthy term in prison is a "fundamental" interest, which also should invoke the strict scrutiny test. Again, petitioner acknowledges that this Court has not yet gone so far, but other courts have. See the opinion of the California Supreme Court in *People v. Olivas,* 17 Cal.3d 236, 551 P.2d 375 (1976), and the opinions of the United States District Court for the District of Connecticut in *United States ex rel Robinson v. York,* 281 F. Supp. 8 (D. Conn. 1968) and *Bolling v. Manson,* 345 F. Supp. 48 (D. Conn. 1972).

Short of the loss of life itself, it is hard to imagine the loss of any constitutionally protected right that is more "fundamental" or dear than 40 years of one's liberty. Hicks walked into prison as a young man of 28 years of age (R. "Conviction: Summary of Facts"). He may walk out of prison only two years shy of his 70th birthday. Surely this is at least as "fundamental" an interest as some of the other interests so characterized by this Court: *Shapiro v. Thompson,* 394 U.S. 618 (interstate movement); *Skinner v. Oklahoma,* 316 U.S. 535 (right to procreate); *Reynolds v. Sims,* 377 U.S. 533 (right to vote). Indeed, even expressed in the terms of these existing "fundamental" interest cases, petitioner can invoke the strict scrutiny test because a 40-year jail term effectively precludes at least interstate movement and the right to procreate.

If the strict scrutiny test is invoked, then the burden would shift to the State of Oklahoma to establish (1) that it has a *compelling interest* which justifies depriving peti-

tioner of the right to jury sentencing and a presentencing hearing while allowing others charged under § 51(A) to have these rights, and (2) that the distinction drawn by the law between those initially sentenced under § 51(A) and those who were resentenced under § 51(A) after having been initially sentenced unconstitutionally under § 51(B) is *necessary* to further its compelling state interest. *Reynolds v. Sims,* 377 U.S. 533; *Shapiro v. Thompson,* 394 U.S. 618.

The State of Oklahoma has already admitted that it would fail this test. *Thigpen v. State,* 571 P.2d 467 (Okl.Cr. 1977). See also the arguments advanced by petitioner under Section II of this Brief dealing with the Cruel and Unusual Punishment prohibition of the Eighth Amendment.

Whether this Court chooses to measure Oklahoma's actions under the traditional test or under the strict scrutiny test, the result is the same: petitioner has been denied Equal Protection of the Law.

CONCLUSION

The judgment of the Oklahoma Court of Criminal Appeals should be reversed and this case should be remanded to that court with instructions that petitioner be released from confinement unless, within a reasonable time, the State of Oklahoma chooses to cause petitioner to be resentenced by a jury upon notice and a fair hearing under 63 O.S. § 2-401.

Respectfully submitted,

DAVID M. EBEL
2600 Colorado National Building
950 Seventeenth Street
Denver, Colorado 80202
Telephone: (303) 892-9400

Court-appointed Counsel for Petitioner

Of Counsel

RICHARD A. SONNTAG
2600 Colorado National Building
950 Seventeenth Street
Denver, Colorado 80202